Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1975.

IN THE

Supreme Court of the United States

October Term, 1975
No. 74-1107

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA.

STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer,
Intervenor [*and Petitioner in No. 74-1304*].

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court below modifying the preliminary injunction originally entered (A. 357-358) is reported at 483 F.2d 432. The findings and conclusions (A. 359-368) and the final decree of the district court (Pet. App. No. 74-1304, xix-xxii) are reported at 375 F. Supp. 456. The opinion of the court below (Pet. App. A1-A17) is reported at 508 F.2d 313.*

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*"Pet. App." refers to the Appendices to the Petition for Certiorari in this case, "Pet. App. No. 74-1304" to the Appen-

(This footnote is continued on next page)

JURISDICTION

The judgment of the court below (Pet. App. B1) was entered on December 4, 1974. A timely petition for rehearing was denied on January 31, 1975 (Pet. App. B2). The petition for certiorari in this case was filed on March 6, 1975, and granted on June 23, 1975. The jurisdiction of this Court rests on 28 U. S. C. §1254(1).

QUESTIONS PRESENTED

1. Whether the severance by Congress of all land and non-navigable water on the public domain, which made all such water subject to the laws of the several arid-land states, may be nullified by automatically attaching to every setting aside of public lands an implied reservation of all undergound water underlying such lands, for all federal purposes whensoever authorized.

2. Whether a proclamation setting aside public land can properly be construed to reserve all underground water underlying such land, including that derived from distant sources, for purposes not recognized by Congress until long after its date.

3. Whether, where public land was set aside in 1952 for national monument purposes under authority of an act for the preservation of antiquities passed in 1906, and thereafter, under legislation first enacted in 1966, such land is deemed primarily valuable for protecting an endangered species of fish, all of the underground water reaching the national monument from

dices to the Petition for Certiorari filed by the intervenor in case No. 74-1304 to review the identical judgment. Where the same matter appears in the appendices to both petitions, citations in the present brief will be restricted to "Pet. App."

many miles distant may be held reserved for the latter purpose, where the operation of such reservation substantially damages farm land miles away, and where state law since 1939 had declared that beneficial rights in underground water could only be acquired by proceedings pursuant thereto.

The foregoing three questions presented were set forth in the Cappaerts' petition for certiorari. Intervenor State of Nevada *ex rel.* Roland D. Westergard, State Engineer, filed its own petition for certiorari to review the identical judgment below, docketed as No. 74-1304, which was also granted, and consolidated with this case. These petitioners are accordingly of the view that they may properly address themselves to an additional question presented in the intervenor's petition, as follows:

4. Whether the federal government must comply with state procedure for establishing the existence and scope of any water right, implied reserved right or otherwise, which it desires to assert to the water beneath reserved and non-reserved land.

STATUTES INVOLVED

Some of the statutes involved are set forth in Pet. App. D1-D8, and in Pet. App. No. 74-1304, xxv-xxvii. Other pertinent statutory provisions not elsewhere set out in full in the present brief appear in Appendix A hereto, below, pp. 91-97.

STATEMENT

This was an action by the United States to enjoin the Cappaerts, petitioners here, from pumping under-

ground water essential to the operation of their large farm and cattle ranch, the complaint alleging that such pumping endangered the continued existence of pupfish in an underground pool many miles distant from petitioners' property (A. 10-14). Relief was granted by both courts below in the view that the setting aside, as part of an existing monument, of the 40 acres of the public domain in which the pool was located, operated as a reservation of all underground water for miles around, for purposes not authorized by Congress until more than a decade after the land in question had been set aside (District court's findings of fact and conclusions of law, A. 359-368; district court's final decree [Pet. App. No. 74-1304, xix-xxii]; opinion below [Pet. App. A1-A17]).

By way of preliminary, there are set forth the most significant chronological datum points relevant to the present litigation:

March 3, 1877	Desert Land Act, 19 Stat. 377.
June 16, 1880	Nevada Lieu Selection Act, 21 Stat. 287.
March 1890 to October 1892	Conveyances by the United States to the State of Nevada, petitioners' predecessor in title, pursuant to 1880 Act.
June 8, 1906	Act for the preservation of American antiquities, 34 Stat. 225.
March 22, 1913	Nevada Act for the Adjudication of Water Rights, now ch. 533, Nev. Rev. Stat.
December 1916 to April 1951	Conveyances by the United States directly to petitioners' predecessors in title.

March 25, 1939	Nevada Act relating to Underground Waters, now ch. 534, Nev. Rev. Stat.
January 17, 1952	Proclamation adding Devil's Hole to Death Valley National Monument, 66 Stat. c18, 17 Fed. Reg. 691.
October 15, 1966	First Endangered Species Act, 80 Stat. 926.
May 24, 1967	U. S. Bureau of Land Management's Las Vegas District Advisory Board considers the Cappaerts' application for an exchange of lands involving over 13,000 acres.
October 14, 1969	By reason of National Park Service's protest against any conveyance within one mile of Devil's Hole, such land was excluded from a proposed exchange, and the United States conveys only 5645.33 acres to the Cappaerts in exchange for land of equal value in Humboldt County conveyed by them.
December 5, 1969	Endangered Species Conservation Act of 1969, 83 Stat. 275.
April 1970	Cappaerts apply to Nevada's State Engineer for permits to pump underground water from their wells.
October 13, 1970	Devil's Hole pupfish, *Cyprinodon diabolis,* first declared an endangered species, 35 Fed. Reg. 16047.

December 16, 1970 Following hearing at which the United States filed protests and participated fully, Nevada State Engineer grants Cappaerts permits for pumping underground waters from their wells.

August 18, 1971 Present action brought by the United States to enjoin Cappaerts' pumping of underground water from wells located on their lands, including wells on lands conveyed to them by the United States in 1969.

December 28, 1973 Endangered Species Act of 1973, 87 Stat. 884.

A. The Cappaerts' Ranch*

"The Cappaerts' ranch consists of 12,000 acres, of which 4,000 acres are in cultivation. The ranch, which represents an investment of more than 7 million dollars, has an annual payroll of more than $340,000 and employs more than 80 people. Between 1700 and 1800 head of cattle are fed on the ranch." (Opinion below, Pet. App. A2.) The record shows that the Cappaerts' crops include wheat, barley, alfalfa, and Bermuda grass (A. 248).

The colored map tipped in as Appendix B at the back of this brief (Defts. 1972 Ex. I, A. 199, 203-

*The Cappaerts' ranch, also known as the Spring Meadows Ranch, is located near Lathrop Wells, Nye County, Nevada (Fdg. 4, A. 361), and was owned by Spring Meadows, Inc., a Nevada corporation. That corporation was voluntarily dissolved on December 30, 1970, the only stockholders being Francis Leo Cappaert and Marilyn I. Cappaert; those two were thereafter substituted as parties defendant herein (Fdgs. 1, 2; A. 360). The remaining defendant-petitioner is the ranch manager (Fdg. 5, A. 361).

204)—technical difficulties precluded its inclusion in the printed Appendix—shows the Cappaerts' ranch in relation to Devil's Hole.

Areas colored blue represent land owned by private individuals other than the Cappaerts (A. 200-201), those colored brown and purple (dark brown color in original exhibit) show portions of the public domain still held by the United States. The purple was the land excluded from the proposed exchange (A. 203).

Areas shown in green are the lands owned in fee by the Cappaerts prior to 1969 (A. 201); these were obtained from two sources. Some were originally patented by the United States to the State of Nevada, pursuant to the Nevada Lieu Selection Act of June 16, 1880, c. 245, 21 Stat. 287, over a period extending from March 1890 to October 1892 (A. 201, 206, 210-214; Defts. 1972 Ex. D1-D11, E1-E13, F1-F23, G1-G26, H1-H6 (not printed)). Other fee lands were patented directly to predecessor owners between December 1916 and April 1951 (A. 215-218; Defts. 1972 Ex. C2-C10 (not printed)).

The area colored yellow represents the land patented directly to the Cappaerts in 1969 (A. 201-202) pursuant to an exchange effected in that year under Section 8 of the Taylor Grazing Act of 1934, as amended, now 43 U. S. C. § 315g(b), *infra*, p. 94.

In order to effectuate this exchange, the Cappaerts acquired about 12,000 acres in Humboldt County, Nevada (A. 246-247), representing to the Chief of the Branch of Lands and Minerals Operations of the U. S. Bureau of Land Management in the State of Nevada that the acreage they sought in exchange, was to be used to enlarge an existing farming and livestock operation

(A. 171-172). The records of the Las Vegas District Advisory Board of the U. S. Bureau of Land Management, which considered the exchange, reflect that this board was fully aware of the Cappaerts' intended use of the land (A. 238-239; Defts. 1972 Ex. K, A. 240-241, 352, 354-355).

In making the appraisals prior to the exchange, required to comply with the statutory command that the exchange be of lands having "an equal value", the Bureau of Land Management representatives considered the availability of water on the land proposed to be traded to the Cappaerts, and their ability to obtain well permits in connection with such land (A. 180-181).

Due publication of the proposed exchange was made, and interested Federal agencies were advised and invited to comment (A. 176-177, 237-238). The National Park Service interposed a qualified objection lest the use of water by the Cappaerts within one mile of Devil's Hole would lower the water level in the hole. In consequence of that objection, land within one mile of Devil's Hole was excluded from the exchange. Ultimately, of the more than 13,000 acres originally sought by the Cappaerts only 5645.33 acres were actually patented to them by the United States on October 14, 1969. The balance of the land was retained by the United States because of the subsequent water and pupfish problems. (A. 176-180, 215, 218, 238; Defts. 1972 Ex. C2, not printed.)

A portion of the 12,000 acres of Humboldt County land acquired by the Cappaerts in contemplation of the exchange was deeded to the United States in return, for the better management of the Bureau of Land Management's Winnemucca district (A. 239).

The tracts obtained by the Cappaerts in the 1969 exchange constitute the southeast portion of their ranch, and are the best land that they have; this is the only portion of the ranch that shows a profit, and hence it carries all the rest (A. 248-249, 254-255).

B. Devil's Hole and the Pupfish

"Devil's Hole, a part of the Death Valley National Monument, * * * consists of a 40-acre tract in which there is a deep limestone cavern. At the bottom of the cavern there is a pool about 65 feet long, 10 feet wide, and more than 200 feet deep. There are steep rock walls on three sides of the pool, but on the fourth side there is a sloping rock shelf on which algae grows. * * *

"The Devil's Hole pupfish [*Cyprinodon diabolis*] live in this pool. These pupfish evolved after the Death Valley Lake System dried up, isolating this species of fish from its ancestral stock. The pupfish population varies from 200 in the winter to 800 after spawning in the spring and depends for its survival on the sloping rock shelf which provides food and a spawning ground. The Devil's Hole pupfish are less than one inch long and do not exist anywhere else in the world." (Opinion below, Pet. App. A2.)

There are of course numerous species of *Cyprinodon* found in the Death Valley drainage system of California and Nevada, which includes Devil's Hole (A. 154), and four species of that genus, other than *diabolis*, were listed as endangered species in 1970 (50 CFR, Part 17, Appendix D). There is also evidence from Government pupfish experts to show that the Devil's Hole pupfish have apparently been successfully transplanted to the Hoover Dam refugium (Defts. 1973 Ex. E; 1973 Tr. 50-53, 256-257, 260; not printed).

Devil's Hole pool is located approximately 50 feet below the surrounding land surface. At one time Devil's Hole was a flowing spring. In the past the water level was at different heights ranging from the top to where it now is. (A. 81-82.) It is probable that the water also was at lower levels in the past (1973 Tr. 230-232, not printed). There are numerous boulders and shelves in the hole at varying higher levels that could have provided the same function for the pupfish as the rock shelf they now use (A. 82). That shelf fell into the hole some time ago and lodged at its present location (1973 Tr. 226, not printed).

The record shows that the Devil's Hole tract is fenced off with barbed wire; it is not accessible to the general public, but only to selected individuals to whom the National Park Service permits access (A. 161). Some individuals who dove into the pool deeper than 200 feet never returned (A. 50).

Death Valley National Monument was first created in 1933, and then enlarged in 1937 (Proc. No. 2028, Feb. 11, 1933, 47 Stat. 2554; Proc. No. 2228, Mar. 26, 1937, 50 Stat. 1823). On both occasions, the Proclamation declared that the withdrawal being made was effected under the 1906 Act for the preservation of American antiquities (Act of June 8, 1906, c. 3060, 34 Stat. 225, now 16 U. S. C. §§431-433; Pet. App. D1-D2).

Pursuant to a third Proclamation reciting the identical statutory authority, the 40-acre tract containing Devil's Hole—the area now in controversy—was in 1952 added to and reserved as a detached unit of the Death Valley National Monument (Proc. No. 2961, Jan. 17, 1952, 66 Stat. c18, 17 Fed. Reg. 691; Pet. App. C1-C3).

Here is the operative paragraph of the third Proclamation:

> "NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, under and by virtue of the authority vested in me by section 2 of the act of June 8, 1906, 34 Stat. 225 (16 U. S. C. 431), do proclaim that, subject to the provisions of the act of Congress approved June 13, 1933, 48 Stat. 139 (16 U. S. C. 447), and to all valid existing rights, the following-described tract of land in Nevada is hereby added to and reserved as a part of the Death Valley National Monument, as a detached unit thereof:"

(The 1906 act is the one for preservation of American antiquities, that of June 13, 1933, simply extended the mining laws of the United States to the Death Valley National Monument.)

Unauthorized persons were expressly warned in that 1952 Proclamation "not to appropriate, injure, destroy, or remove any feature of this addition to the monument and not to locate or settle on any of the lands thereof" (Pet. App. C2).

Nothing was said in the 1952 Proclamation about water rights, surface or underground, and the only mention therein of "a peculiar race of desert fish" occurs in the fourth of its five preambles.

In November 1969, at the National Park Service's headquarters at Furnace Creek, California, federal, state, and university representatives attended a symposium sponsored by the California Department of Fish and Game; this symposium was devoted to the protection and preservation of the rare and endangered

fishes of the Death Valley System. The report of the symposium proceedings was prepared by Edwin P. Pister, one of the government's expert fishery biologist witnesses in the present case (A. 152-153, 161), and it forms part of the record here (Defts. 1972 Ex. B, A. 132-133, 163-164, 314-351).

One of the other participants in the Furnace Creek symposium was Professor Carl L. Hubbs of the Scripps Institute of Oceanography, La Jolla, California (Defts. 1972 Ex. B at A. 351). During the proceedings—according to Professor Robert R. Miller, his son-in-law (A. 129) and another Government expert at the trial (A. 112-113)—Professor Hubbs "discussed that [1952] proclamation because he was the one that was chiefly instrumental in getting the Devil's Hole set aside as part of the National Monument. * * * He pointed out that the National Park Service did not have a policy for setting aside a national monument to preserve endangered species, and therefore he had come up with this idea of pointing out the travertine deposit as a means of getting Devil's Hole set aside as part of Death Valley National Monument. * * * it took him quite a little while to get some action" (A. 131).

The official record of the symposium reports Professor Hubbs' comments in these terms (Defts. 1972 Ex. B at A. 319):

> "The first step towards habitat protection in this area was the establishment in 1952 of Devil's Hole as part of Death Valley National Monument. Interestingly, this was done ostensibly because of the unique travertine limestone formations, but not to preserve *Cyprinodon diabolis*, the unique fish inhabitant."

Mr. Pister, reporter for the symposium, used a tape of the proceedings in making up his written report (A. 132, 161-164).

Another participant in the Furnace Creek symposium, Mr. Sterling Bunnell of The Nature Conservancy (Defts. 1972 Ex. B at A. 350; see also A. 348, ¶10), published an article in *Action in California Tomorrow*, which stated (A. 168-169):

> "In 1940, Carl Hubbs and R. R. Miller first suggested that the hole be made part of the Death Valley National Monument. Park Service naturalists initially rejected the idea, citing its distance from monument headquarters and their doubts as to the uniqueness of the species. But in 1952, Hubbs and Miller were successful in convincing the service that the hole was worthy of inclusion in the monument. In doing so, they cited an unusual travertine limestone formation in the hole as a pretext, since park service policy at that time did not consider saving a rare animal species sufficient reason for acquiring land."

C. Endangered Species Legislation and Executive Action

There have been three acts of Congress for the protection of endangered species, all of them providing for purchase or other acquisition of land for that purpose, none of them laying claim to any water, surface or underground.

1. The first such act dates from October 15, 1966 (Pub. L. 89-669, 80 Stat. 926).

Section 2(b) thereof, 80 Stat. at 927, provided—

> "(b) In addition to the land acquisition authorities in such Acts [Migratory Bird Conservation

Act as amended; Fish and Wildlife Act of 1956 as amended; Fish and Wildlife Conservation Act], the Secretary [of the Interior] is hereby authorized to acquire by purchase, donation, or otherwise, lands or interests therein needed to carry out the purpose of this Act relating to the conservation, protection, restoration, and propagation of selected species of native fish that are threatened with extinction."

2. Three years later, the 1966 legislation was supplemented by the Act of December 5, 1969 (Pub. L. 91-135, 83 Stat. 275).

That Act provided as follows in its Section 12(d), 83 Stat. at 283:

"(d) The provisions of Sections 1 through 5 of this Act, and sections 1 through 3 of the Act of October 15, 1966 (80 Stat. 926; 16 U. S. C. 668aa-668cc), as amended, shall hereafter be cited as the 'Endangered Species Conservation Act of 1969' ".

In the interim, Section 2(b) of the 1966 Act had not been amended.

3. Both the 1966 and the 1969 Acts were in large measure superseded and partially repealed by the Endangered Species Act of [December 28] 1973 (Pub. L. 93-205, 87 Stat. 884, 16 U. S. C. §§ 1531-1543).

The "land acquisition" provisions of the 1973 Act (87 Stat. at 889, 16 U. S.C. §1534) are as follows:

"Sec. 5 *(a) Program.*—The Secretary of the Interior shall establish and implement a program to conserve (A) fish or wildlife which are listed as endangered species or threatened species pursuant to section 4 of this Act; or (B) plants which are included in Appendices to the Convention. To carry out such program, he—

(1) shall utilize the land acquisitions or other authorities under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interests therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Acquisitions.—Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section."

4. With respect to executive action under the foregoing legislation, Devil's Hole pupfish, *Cyprinodon diabolis*, were first declared an endangered species on October 13, 1970 (35 Fed. Reg. 16047; 50 CFR, Part 17, Appendix D).

D. The Underground Water; Effects of Pumping

The water under both the Cappaerts' ranch and Devil's Hole is collected in a large underground basin that extends over an area of 4500 square miles, underlying which there is a limestone aquifer. (An aquifer is simply a geological formation or structure that transmits water). Some of the water comes from more than 70 miles away (A. 71-79).

Any substantial pumping anywhere within the 4500 square mile aquifer will in time affect the water level in

Devil's Hole (A. 78-80, 99-101). The precise effect of such pumping, as the present record shows, cannot be accurately predicted even by learned hydrologists of wide experience (A. 65-67, 99-102, 103-105, 253, 264-265, 267-268).

A recorder in Devil's Hole measures its water level continuously; all such levels are calculated with reference to distance below a copper washer installed there in 1962. Hence "3.7" means a water level 3.7 feet below the washer (A. 31-32; 1973 Tr. 109, not printed).

"Between 1962 and 1968 the average water level was 1.2 feet below the marker. In 1968, after the Cappaerts began to pump, the summer water level"—they pump only from March to October (A. 254)—"steadily decreased: in 1970 to 3.17 feet below the marker; in 1971 to 3.48 feet and in 1972 to 3.9 feet. At these water levels large areas of the critical rock shelf are exposed. At 3.6 feet below the marker, 42 per cent of the shelf is exposed, and at 3.7 feet the exposure increases to 55 per cent. The shelf exposure decreases the algae production and limits the spawning area which in turn reduces the Devil's Hole pupfish's chance to survive" (Opinion below, Pet. App. A3).

However, the present record shows that in Devil's Hole, lower than the sloping rock used for spawning, there are also three somewhat similar rocks below the surface that are also used by the pupfish, who can be found on all of them. During censuses taken in 1972 and 1973, there were more pupfish on the lower shelves than on the shelf near the surface (1973 Tr. 135, not printed).

As the map at the end of this brief shows, the Cappaerts' wells numbered 1, 2, 3, 4 and 6 are located on

lands obtained prior to 1900 by their predecessors in title (Defts. 1972 Ex. D1-D11, E1-E13, F1-F23, G1-G26, H1-H6; not printed). But their wells numbered 5, 16, and 17 are located on tracts that they obtained in the 1969 exchange with the Government (A. 205).

If the Cappaerts are unable to pump their wells numbered 1, 2 and 17, they will be forced to close down the southeastern portion of their ranch—its only profitable part—and all that is now planted there will be lost (A. 254-255).

The record shows why wells 16 and 17 were dug where they are now situated; "the main reason was that based on the information that the U. S. G[eological]. S[urvey]. could give us, that we had the water there, and that it was not involved with water connected with Devil's Hole" (A. 253).

There was also testimony, from the Cappaerts' ranch manager, that Dr. Dudley, the Government's expert hydrological witness from the U. S. Geological Survey, had in September 1971 said, in connection with wells 16 and 17, that "it was his opinion that the water supplying that area where those wells were was separate from that being supplied to Devil's Hole, and it was in his opinion that what we did in the way of pumping or drilling in that area would not affect the others" (A. 264). Thereafter, wells Nos. 16 and 17 were drilled (A. 264-265).

Recalled in rebuttal, Dr. Dudley testified that what he had said was "that we had no evidence that there would be any effect from that area; but there might well be" (A. 267). But, on cross-examination (A. 268):

"Q And did you tell them at that time you didn't think that drilling in that area would affect the level?

"A I can not recall if I said it.

"Q You could very well have?

"A I suppose I might have."

E. The Cappaerts' Well Pumping Permits

Pursuant to the Nevada statutes relating to underground waters (Pet. App. D7-D8; Pet. App. No. 74-1304, xxvii; *infra*, pp. 94-97), the Cappaerts in April 1970 applied for, and on December 16, 1970, obtained, permits from the State Engineer of Nevada to drill wells 1-5 and 17 (A. 222-223, 227-278).

The record of the proceedings before the State Engineer (A. 281-313) shows that the National Park Service formally protested the Cappaerts' applications, and asked that they be denied (Govt. 1972 Ex. 12-17, A. 228-230, 269-280). Those protests specifically recited (e.g., A. 271-272, 273-274, 275-276) "that further lowering of the water level in Devil's Hole, Ash Meadows, Nevada would result from the pumping of underground water in this area. This in effect would result in further threat of extinction to the already endangered native fishes of the genus Cyprinodon (Desert Pupfish) which inhabit Devil's Hole. In recent months other springs in the area which provide the habitat for these native fishes have shown indications of marked decreased flow as a result of the pumping of the underground water sources."

At the hearing before the State Engineer, the representative of the United States recited facts relating to the pupfish and to the water level in the Devil's Hole pool

(A. 286-287), referred specifically to the 1952 Proclamation, and said (A. 287):

"The Proclamation recognized the unique scientific value of the Devil's Hole pupfish and stated that the subterranean pool in Devil's Hole is 'of such outstanding scientific importance that it should be given special protection.' The 'peculiar race of desert fish' was cited by the President as a primary reason for protecting Devil's Hole."

He further said (A. 287-288):

"These diminutive fish, because of their restricted distribution and numbers, are recognized as endangered species and are on the list of endangered species of the United States promulgated by the Secretary of the Interior under the provisions of the Rare and Endangered Species Act of 1965, 16 U. S. C. 668aa."

The 1952 Proclamation was offered and received (A. 306, 308), but, as indicated, the State Engineer rejected the National Park Service protests, and granted the pumping permits sought by the Cappaerts.

The United States did not seek judicial review of the State Engineer's grants of those permits, as it might have done under NRS 534.030.3 and 533.450 (*infra*, pp. 94-97). Instead, it brought the present independent action for injunctive relief.

The court below held, however, that the State Engineer's action did not amount to *res judicata* so as to bar the present proceeding (Pet. App. A15-A16).

F. Travel of the Case; Rulings Below Affecting the Water Level

Having failed to convince the State Engineer. and having thereafter failed to appeal his rulings as provided by Nevada law, the United States then on August 18, 1971, brought the present action (A. 2). Thereafter, pursuant to stipulations that limited the Cappaerts' pumping, a hearing on the Government's motion for a preliminary injunction was postponed from time to time (A. 2).

An amended complaint was filed on May 2, 1972; the State of Nevada on the relation of its State Engineer moved to intervene as a party; and a hearing on the amended motion for a preliminary injunction was held early in July 1972 (A. 2, 21-268).

After the district court indicated in a minute entry that a preliminary injunction would be granted, the Government moved for an order adjudicating defendants in contempt, and for a temporary restraining order. The first motion was denied, but after a further hearing the district court made findings of fact and conclusions of law, entered a preliminary injunction, and appointed a special master (A. 3).

That injunction, entered on June 5, 1973 (A. 4), required the Cappaerts to limit their pumping so that a 3.0 feet level would be attained in the Devil's Hole pool. Both the Cappaerts and the State of Nevada, which had earlier been permitted to intervene (A. 2, 21), appealed the preliminary injunction (A. 7, 8). The Cappaerts moved for a modification of the preliminary injunction pending appeal, first unsuccessfully in the district court (A. 4), next unsuccessfully in the court of appeals (A. 7). But, on reconsideration, the court of

appeals modified the preliminary injunction on August 20, 1973, to require only a level of 3.3 feet, that court saying that "there is little reason to believe that the present order we now direct will result in the extinction as a species of the pupfish in Devil's Hole" (A. 357).

Following argument of the appeals, the court of appeals on January 24, 1974, remanded the case for entry of a final judgment (A. 358-359); and such a judgment was duly entered by the district court on April 9, 1974, again ordering a pool water level of 3.0 feet (Pet. App. No. 74-1304, xix-xx).

Once again, petitioners and the intervenor both appealed (A. 8, 9); once again, the court of appeals modified the final judgment below to permit the Devil's Hole water level to remain at 3.3 feet (A. 8, 369 [two orders]). It then proceeded, pursuant to its earlier orders (A. 8), to determine the second appeals "without further briefs or argument" (A. 8, 359).

The final judgment of the court of appeals, entered on December 4, 1974, affirmed the district court's fixing of the 3.0 feet level, but remanded the case for that court "to determine whether, on the facts developed during the pendency of this appeal, the lower water level [3.3 feet] may be adequate to preserve the pupfish" (Pet. App. A16-A17, B1).

Following denial of a timely petition for rehearing (Pet. App. B2), the court of appeals stayed its mandate (A. 9). The Cappaerts and the intervenor then filed separate petitions for certiorari; both were granted by this Court, which consolidated the two for argument.

The record reflects zealous prosecution of the cause by the Government. (a) Prior to the entry of a formal

preliminary injunction by the district court, the Government moved to cite petitioners for contempt (Dist. Ct. docket entry, May 10, 1973; A. 3). (b) During the pendency of the appeals from the preliminary injunction, the Government moved for the entry of a permanent injunction (Dist. Ct. docket entry, Sept. 10, 1973; A. 5). (c) Before the court of appeals had denied either petition for rehearing, and hence before either of the petitions for certiorari in this matter could be filed, the Government moved in the district court to establish the 3.0 feet water level (Dist. Ct. docket entry, Jan. 21, 1975; A. 6).

SUMMARY OF ARGUMENT

I.

A. By a series of enactments in 1866, 1870, and 1877, all passed pursuant to the Property Clause (Art. IV, Sec. 3) of the Constitution, Congress effected a severance of all land and non-navigable water on the public domain in the arid western third of the country, and made all such waters subject to local law.

B. That severance, as well as that subjection to local law, were both given effect by this Court in a series of decisions from 1935 to 1951, from *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142, to *Dority v. New Mexico ex rel. Bliss*, 341 U. S. 924.

C. Thereafter the foregoing doctrine was sharply limited and held inapplicable to withdrawn lands, in a later decision (*Federal Power Comm. v. Oregon*, 349 U. S. 435—the *Pelton Dam* case) that was rendered without any apparent knowledge that since 1935 at the latest all land on the public domain had been with-

drawn, and that overlooked as well the Congressionl transfer of jurisdiction over non-navigable water to the several arid-land states. Yet such a transfer was an integral part of the *California Power* line of decisions.

D. Since the *Pelton Dam* case, and following several rulings that turned on arrangements for the benefit of Indians, the Court has apparently embraced the wholly different principle that every withdrawal of land by the United States carries with it an implied reservation of sufficient water to effectuate the federal purpose for which it was withdrawn.

II.

The implied reservation doctrine is properly applicable only to situations involving Indians, for two reasons.

First, under a settled rule of decision, all agreements with Indian tribes, who are wards of the nation, will be construed in their favor.

Second, Indian rights are national in nature and prevail over those of the states; this proposition has been ruled from *Worcester v. Georgia*, 6 Pet. 515, through *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164. That is why there can be an implied reservation of water rights in connection with a withdrawal for the benefit of the Indians, even when such withdrawal followed the Desert Land Act of 1877 that transferred to the arid-land states in all other respects full jurisdiction over non-navigable waters on the public domain within their several borders.

This result may not be entirely logical, but Indian law is characteristically *sui generis*.

III.

If, however, the implied reservation doctrine is to be extended to every non-Indian situation whenever an "intention" to reserve water can fairly be implied from the instrument of withdrawal, then the result reached below is still wrong.

A. When Devil's Hole was reserved, in 1952, the *California Power* doctrine was in full force, having been reaffirmed less than nine months earlier. *Dority v. New Mexico ex rel. Bliss,* 341 U. S. 924.

B. Additionally, the text of the 1952 Proclamation mentions pupfish only to confirm the remarkable scientific interest of the pool being reserved, and neither declares them to be of scientific interest nor to be themselves worthy of protection. As a matter of language, that Proclamation is simply not susceptible of the meaning interpolated into it below.

C. The record lays bare the dissimulation that underlay the preparation of the 1952 Proclamation. The sponsors of that document proceeded by subterfuge, stressing the geological features of Devil's Hole because fully aware that there was then no statutory basis for protecting pupfish or indeed any other rare species.

D. The legislative history of the only statute on which the 1952 Proclamation purported to rely, the 1906 Act for the preservation of American antiquities, shows that this measure was designed to protect only archeological remains, plus artifacts therein suitable for preservation in museums. It was not drawn to embrace the protection of living species, and moreover withdrawals of land under its terms were specifically limited to the smallest possible extent. Both the text as

well as the legislative history of the 1906 Act under which the 1952 Proclamation was issued negative any intent whatever to reserve underground water from an aquifer 4500 square miles in extent and many miles distant from the 40-acre tract actually reserved in this case.

E. Since Congress did not adopt the protection of endangered species as a public purpose until 1966, it is obvious from the arguments now being advanced here that the Government is seeking to give that legislation *ex post facto* effect.

F. As late as 1971, a Government hydrological expert foresaw no effect on the water level in Devil's Hole from the pumping of water from particular Cappaert tracts more than one mile distant therefrom. This is emphasized, not to lay the predicate for an estoppel, but simply to show that the President in 1952 could not possibly have intended to reserve waters that the Government's expert more than 19 years later considered to be without effect on Devil's Hole. Yet the next year the same expert testified that pumping anywhere in the 45000 square mile aquifer would eventually affect the Devil's Hole water level.

G. All the endangered species acts contain authority for condemning lands for the purpose of protecting such species, and absent condemnation proceedings pursuant to which they would be compensated, the Cappaerts' farm property may not be taken from them to protect the pupfish. If the public interest requires the taking of the property of individual farmers in order to protect the continued existence of pupfish located many miles distant from the farms involved, "resort must be had to proceedings by eminent domain; so that,

through taxation, the burden of relief afforded in the public interest may be borne by the public." *Louisville Bank v. Radford,* 295 U. S. 555, 602.

IV.

When the Cappaerts applied for pumping permits for their wells pursuant to the Nevada statute relating to underground water, their applications were protested by the National Park Service on the ground that the contemplated pumping would endanger the Devil's Hole pupfish. At the hearing before the Nevada State Engineer on those applications, a representative of the United States invoked the 1952 Proclamation and asserted the damage to the pupfish —the precise issues of law and fact that have been and are still being litigated in the present case. After the grant of the permits, the United States did not appeal, as it could have done under Nevada law, with a right thereafter to carry any federal question to this Court. *United States v. District Court for Eagle County,* 401 U. S. 520. Consequently, having failed to pursue its appellate remedies, the United States was not thereafter free to bring the present independent and collateral action.

A. Whenever a specific administrative procedure has been prescribed for the adjudication of particular claims and contentions, the losing party cannot thereafter relitigate the same subject-matter in an independent judicial proceeding. That is a principle of general application, evidenced by rulings that deal with many administrative tribunals of varying scope and functions, and one that will be fully articulated here, not only by the intervenor in the present litigation, the State of Nevada in No. 74-1304, but also by the *amici* and by both sets of petitioners in the water rights case from

Colorado that will be argued here this Term (*Colorado & C District v. United States,* No. 74-940; *Akin v. United States,* No. 74-949).

B. Moreover, the failure of the United States to appeal the State Engineer's grant of the well pumping permits to the Cappaerts, for which the path was open, makes his determination *res judicata*. True, the United States was not a party to the proceeding before him, but its representative appeared; he participated in the proceedings; and he made precisely the same contentions of law and fact that the representatives of the United States have been making at every stage of the present case. Consequently, under a precedent that is substantially weaker than the facts now appearing, the United States is barred from relitigation. *United States v. Silliman,* 167 F.2d 607, certiorari denied, 335 U. S. 825. *Res judicata* is simply a specialized facet of the general rule that the losing administrative litigant is not thereafter free to retry *de novo* in a court the precise claim that the administrative tribunal has already rejected.

ARGUMENT

Dramatically speaking this case presents a contest between two endangered species.

On the one hand there are the Devil's Hole pupfish, *Cyprinodon diabolis,* a pecular marine species, actually fish about an inch long at maturity, whose population has remained constant at between 200 to 800, and who were first declared to be endangered in 1970.

On the other hand there are the individual farmers of the United States, whose numbers had declined by 40 per cent from 1935 to 1970, while the country aggregate farm population over the same period dropped by a fearful 70 percent. *Statisical Abstract of the United States, 1974,* pp. 592, 596, 597.

But the legal issues now here for review cut far deeper. The ruling below, as the intervenor and the *amici* will develop in greater detail, actually threatens the future existence of the Western third of our nation. For, by unwarrantably expanding the doctrine of implied reservation of water rights to a drily logical extreme through unjustifiable and doctrinaire applications of generalized absolutes, that decision has nullified both the Congressional severance of land and water rights on the public domain wherever the arid-land rule of prior appropriation holds sway, as well as the Congressional subjection of all non-navigable waters in such areas to state law. Thus what was decided below in this case threatens the very life of the entire West.

The Cappaerts will show, after first outlining the orthodox rule several times recognized and applied here, that the implied reservation doctrine has a very much narrower scope than that subsequently recognized anywhere. Alternatively, they will then demonstrate that,

even if the implied reservation doctrine may properly be applied in instances where the United States, by a fair reading of the instrument reserving the land in question, "intended" to reserve both surface and underground waters appurtenant thereto, no such intent can possibly be spelled out of the 1952 Proclamation that forms the sole basis of the Government's case here, much less out of the statute on which that Proclamation purported to rely. Finally, the Cappaerts will point out that the Government's sole forum of first instance for the establishment of its water rights here was at the hearing before Nevada's State Engineer. His determination was expressly made subject to judicial review, in which all federal rights could have been asserted and preserved, and the United States, which did not pursue that route, was consequently not free to bring the present independent action.

I.

IN VIEW OF THE SEVERANCE OF LAND AND WATER ON THE PUBLIC DOMAIN, EFFECTED BY CONGRESS IN 1877 PURSUANT TO THE PROPERTY CLAUSE OF THE CONSTITUTION, JURISDICTION TO DISPOSE OF ALL NON-NAVIGABLE WATERS ON THE PUBLIC DOMAIN, WHETHER SURFACE OR UNDERGROUND, PASSED TO THE SEVERAL ARID-LAND STATES; BUT THIS PRINCIPLE HAS BEEN WIDELY IGNORED SINCE ITS ORIGINAL FORMULATION BY THIS COURT 40 YEARS AGO

A. Congress Effected a Severance of Land and Water on the Public Domain in the Arid Western Third of the Country

By a series of enactments in 1866, 1870, and 1877, Congress effected a severance of all non-navigable waters from the land of the public domain in the arid west-

ern portion of the nation, and made all such waters subject to local law. All of these actions were taken under the Property Clause of the Constitution, Art. IV, Sec. 3, which grants to Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *."

Section 9 of the Act of July 26, 1866, c. 262, 14 Stat. 251, 253 (*infra*, p. 91), provided that the owners of vested rights to use water for mining, agricultural, manufacturing, or other purposes, would be protected, and granted such owners rights of way for the necessary canals and ditches.

Section 17 of the Act of July 9, 1870, c. 255, 16 Stat. 217, 218 (*infra*, p. 91) expressly stated "That none of the rights conferred by", *inter alia*, the preceding section of the 1866 Act, "shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by" section 9 of the 1866 Act, just above.

Finally, on March 3, 1877, Congress passed what has since been termed the Desert Land Act, c. 107, 19 Stat. 377 (*infra*, pp. 92-94), the operative proviso of which was in these terms:

> "*Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

Section 3 of the Desert Land Act listed the localities to which its provisions were applicable, then three states and eight territories. By reason of subsequent amendment of that section, and of the admission to the Union of all the remaining territories, the Desert Land Act remains effective in all 13 arid-land states (43 U. S. C. §323, Pet. App. D4), as follows: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

(For the present form of the several statutes just discussed, see 43 U. S. C. §§321, 323, and 661; Pet. App. D2-D5).

B. The Congressional Severance of Land and Water on the Public Domain, and the Subjection of All Non-Navigable Water Thereon to the Jurisdiction of the Several Arid-Land States, Were Fully Recognized and Given Effect by This Court in 1935, in a Decision That Was Faithfully Followed for 16 Years

The classic exposition of what was done by the statutes just discussed appears in *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142, decided by a unanimous Court in 1935.

Extended quotation from that opinion seems amply justified; its teaching was later overlooked and then forgotten here, its principles were wholly disregarded below, and indeed the decision itself was not even cited in either of the Government's oppositions in this case (Br. Op. No. 74-1107; Memo, Op. No. 74-1304).

Mr. Justice Sutherland, a Utah lawyer intimately familiar with the greening of the arid West, said for the Court (295 U. S. at 162-165; footnote omitted):

> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson,* 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation.* It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed

> or acknowledged by the customs, laws, and judicial decisions of the state of their locations. If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.
>
> "The proceedings in connection with the adoption of the Desert Land Act bear out this view. The bill which subsequently became the act was called up for consideration in the Senate on February 27, 1877. The report of the committee, among other things, said that the large portions of the lands bordering on the streams had been appropriated; that the provisions of the bill would enable settlers by combined efforts to construct more extensive works and reclaim lands now worthless; that a system had already grown up in the states and territories included in the bill which recognized priority of appropriation as the rule governing the right to the use of water, limiting the amount to that actually used, and thus avoiding waste.
>
> * * * * *
>
> There is nothing in the language of the act, or in the circumstances leading up to or accompanying its adoption, that indicates an intention on the part of Congress to confine the appropriation of water in contravention of the common-law doctrine to desert-land entrymen.
>
> *"Second.* * * * What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain be-

came *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' *Kansas v. Colorado,* 206 U. S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See *Wyoming v. Colorado,* 259 U. S. 419, 465.

"The public interest in such state control in the arid-land states is definite and substantial. In *Clark v. Nash,* 198 U. S. 361, 370, this court accepted that view to the extent of holding that in the arid-land states the use of water for irrigation, although by a private individual, is a public use; and sustained as constitutional a state statute which, for purposes of irrigation, permitted an individual to condemn a right-of-way for enlarging a ditch across the land of another. * * *."

As the Cappaerts have said, the decision was unanimous; the Court as then constituted included not only outstanding jurists from riparian states, such as Hughes C. J. and Brandeis, Stone, and Cardozo JJ., but also, from the arid West, Mr. Justice Van Devanter, whose six years as Assistant Attorney General for the Interior

Department had assuredly not bred in him hostility to Federal claims of right (24 L. D. v; 32 L. D. v; 121 Fed. v; 316 U. S. viii-x).

A few years later, another unanimous Court pointed out in *Ickes v. Fox,* 300 U. S. 82, 95, that, by the Desert Land Act of 1877,

> "if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states."

Once again, in the interstate contest over the waters of the Platte River, *Nebraska v. Wyoming,* 325 U. S. 589, 612, the Court said:

> "The Desert Land Act 'effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself.' *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U. S. 142, 158. It extended the right of appropriation to any declarant who reclaimed desert land and provided: 'all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.' See *Ickes v. Fox,* 300 U. S. 82, 95; *Brush v. Commissioner,* 300 U. S. 352, 367."

Five years later, in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, a case involving the Friant Dam project in California, the Court said (p. 734, footnote omitted):

> "We cannot disagree with claimants' contention that in undertaking these Friant projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, amd maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws. *Cf. Nebraska v. Wyoming*, 295 U. S. 40, 43; *Power Co. v. Cement Co.*, 295 U. S. 142, 164; *Nebraska v. Wyoming*, 325 U. S. 589, 614; *Mason Co. v. Tax Comm'n*, 302 U. S. 186. * * *"

Meanwhile, in 1913, Nevada had enacted a comprehensive water code for surface water, which established a systematic and orderly procedure, including provision for judicial review, for procuring appropriative water rights; the pertinent provisions of that code, now set forth in ch. 533 of the Nevada Revised Statutes, appear in Pet. App. D7; Pet. App. No. 74-1304, xxv-xxvii; and below, pp. 94-97.

Thereafter, following this Court's decisions in *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142, and in *Ickes v. Fox*, 300 U. S. 82, both *supra*, Nevada in 1939 enacted a similar code for underground water; this is now ch. 534, Nev. Rev. Stat. and its pertinent

sections appear in Pet. App. D7-D8; Pet. App. No. 74-1304, xxvii; and below, p. 97.

New Mexico had, in 1931, also enacted an equivalent statute governing the appropriation of subsurface water, pursuant to which that state sued to enjoin an individual's use of surface water not acquired under that statute; the latter defended by asserting the unconstitutionality of the legislative enactment. But the Supreme Court of New Mexico held that, under both state and federal law, the waters in question were subject to appropriation only under that statute. *State v. Dority*, 55 N. M. 12, 225 P.2d 1007.

An appeal to this Court was dismissed for want of a substantial federal question, specifically citing *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142. *Dority v. New Mexico ex rel. Bliss, State Engineer*, 341 U. S. 924.

Thus, up to May 7, 1951, the date of the dismissal order just cited, the *California Power* case represented the law of this Court.

C. In 1955, However, the Court Sharply Limited the Foregoing Decisions by Holding Them Inapplicable to Withdrawn Lands

But, with the passing of the years, there came a new judicial generation that knew not Joseph; by June 1955 not a single member of the Court that had decided the *California Power* case in 1935 was still alive. (Mr. Justice Roberts, who resigned in 1945, had died in May 1955. 349 U. S. vii.)

It is the foregoing circumstance which, perhaps more than any other, explains the next case, *Federal Power Comm. v. Oregon*, 349 U. S. 435, decided June 6,

1955. There non-navigable waters were held not to be within the doctrine of the earlier cases because, forsooth, the lands in question had been reserved by the United States, and thus were not "public lands" within the Desert Land Act. The rationale of the decision appears from the following (pp. 447-448; italics in original):

> "The nature and effect of these Acts [of 1866, 1870, and 1877] have been discussed previously by this Court. The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs. *Jennison v. Kirk,* 98 U. S. 453. The Desert Land Act severed, for purposes of private acquisition, soil and water rights *on public lands,* and provided that such water rights were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U. S. 142. See also, *Nebraska v. Wyoming,* 325 U. S. 589, 611-616.
>
> "It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State, because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers 'sources of water supply upon the public lands . . . .' The lands before us in this case are not 'public lands' but 'reservations.' Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. 'It is a familiar principle of public land law that statutes

> providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose.' *United States v. O'Donnell,* 303 U. S. 501, 510. See also, *United States v. Minnesota,* 270 U. S. 181, 206. The instant lands certainly 'are not unqualifiedly subject to sale and disposition . . . .' Accordingly, it is enough, for the instant case, to recognize that these Acts do not apply to this license, which relates only to the use of waters on reservations of the United States."

There was articulate dissent from a justice hailing from an arid-land state. Said Douglas J. (pp. 452-453, 456-457; footnote omitted):

> "I would not suppose the United States could erect a dam on this nonnavigable river without obtaining its water rights in accordance with state law. If I am right in that assumption, then this dam cannot be built without satisfying Oregon's water-rights law. For the federal licensee who will build this dam acquires all its rights from the United States. And the United States cannot give what it does not have.
>
> "The argument pressed on us by the United States is akin to the one urged in *Nebraska v. Wyoming,* 325 U. S. 589, 611 *et seq.* In that case, the United States struggled to be rid of the rule of law that made its water rights on nonnavigable streams of the West dependent on state law. It claimed that it owned all the unappropriated water in the basin of the North Platte River. The argument was made not only under the Reclamation Act of 1902, 32 Stat. 388, but also under

the Desert Land Act of 1877, 19 Stat. 377, the Act involved here. We reserved decision as to whether under some circumstances the United States might be the owner of unappropriated water rights. But we held that under those Acts the United States took its water rights like other landowners, *viz.*, pursuant to state law governing appropriation.

"Unless we are to depart from that ruling, we must accept Oregon's claim here.

* * * * *

"It was under this Act [of June 25, 1910, 36 Stat. 847] that some of the lands here involved were reserved for a power site. But the Act of June 25, 1910, by its very terms, did no more than withdraw these public lands 'from settlement, location, sale, or entry.' The Act did not purport to touch or change in any way the provision of the Desert Land Act that pertains to water rights. If the words of the 1910 Act are to control, water rights remained undisturbed. The lands remained 'public lands,' save only that settlers could not locate on them. I assume that the United States could have recalled its grant of jurisdiction over water rights, saving, of course, all vested rights. But the United States has not expressly done so; and we should not construe any law as achieving that result unless the purpose of Congress is clear.

"The reason is that the rule adopted by the Court profoundly affects the economy of many States, ten of whom are here in protest. In the West, the United States owns a vast amount of land—in some States, over 50 percent of all the

land. If by mere Executive action the federal lands may be reserved and all the water rights appurtenant to them returned to the United States, vast dislocations in the economies of the Western States may follow. For the right of withdrawal of public lands granted by the 1910 Act is not only for 'water-power sites' but for a host of public projects —'irrigation, classifications of lands, or other public purposes.' Federal officials have long sought that authority. It has been consistently denied them. We should deny it again. Certainly the United States could not appropriate the water rights in defiance of Oregon law, if it built the dam. It should have no greater authority when it makes a grant to a private power group."

Analytically, there are two reasons why the case of *Federal Power Comm. v. Oregon,* also known as the *Pelton Dam* case, because that was the project involved, cannot be supported.

First. The Court's decision rested on a far-reaching mistake of fact that undercuts the entire rationale of the opinion.

In actual fact, although obviously quite unbeknownst to the Court, since 1934 and 1935, twenty years earlier, there had not been a single tract of land forming part of the public domain in any of the thirteen arid-land states that was still subject to sale or disposition.

For, on November 26, 1934, in respect of all the arid-land states except Washington, an omission remedied on February 5, 1935, "all of the vacant, unreserved and unappropriated public land" in those states (as well as in 11 others) was "temporarily withdrawn from settlement, location, sale or entry, and reserved for

classification" in connection with the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, 43 U. S. C. §§315 *et seq.* See Ex. O. No. 6910, 54 I. D. 539; Ex. O. No. 6964, 55 I. D. 188.

Those executive orders, effecting as they did a blanket withdrawal of every remaining tract of unappropriated public land, indeed marked the end of the frontier; they wrote finis to homesteading everywhere except in Alaska—which was expressly excepted from the Taylor Grazing Act (see Sec. 1, 43 U. S. C. §315), and to which the Desert Land Act had never applied. Thereafter lands owned by the United States could only be acquired by private individuals pursuant to existing rights, or under the mining laws, or through authorized exchanges. (Although the executive orders spoke of "temporarily" withdrawing the remaining public lands, in actual fact the withdrawals then effected have turned out to be permanent.)

Actually, therefore, the construction placed on the words "public lands" in the Desert Land Act by the decision in the *Pelton Dam* case, 349 U.S.435, 447-448, made those words meaningless—and in consequence wholly nullified, though under an all-pervasive mistake of fact, the teaching of *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142, and of the line of cases here that had faithfully followed it for 16 years.

It is significant in this connection that the lands removed from disposition pursuant to the blanket withdrawals of 1934 and 1935 aggregated some 163,000,000 acres. Public Land Law Review Commission, *One Third of the Nation's Land* (1970) 52.

The same report indicates that, excluding the two Dakotas, less than ten per cent of whose area is owned

by the United States, the average percentage of all land in the remaining arid-land states still held by the Government in 1968 came to 47 per cent—nearly half. See table at *id.* 327.

Second. Not only did the Court in the *Pelton Dam* case proceed under a fundamental misapprehension of fact, it wholly overlooked a most significant portion of the earlier rulings.

The *California Power* decision had done more than simply recognize the severance of land and water that Congress had effected in 1877, it emphasized throughout that, as a part of such severance, jurisdiction over all of the non-navigable waters thus severed passed to the several states and territories constituting the arid-land portion of the country.

Here is what the Court had said in *California Power* in 295 U. S.: "* * * Congress intended to establish the rule * * * that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named" (p. 162); that "the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted" (*ibid.*); that after 1877 "all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states" (pp. 163-164); and that "The public interest in such state control in the arid-land states is definite and substantial" (p. 165).

All the above, in the aggregate an integral element of the *California Power* doctrine, was simply forgotten and overlooked, in large measure because of a mere play on the words "public lands"—which was actually a verbalism resting on an assumption that for 20 years

prior to the *Pelton Dam* decision had been without factual support.

Third. In view of the circumstance that this Court in *Pelton Dam* quite overlooked the jurisdictional aspects of its earlier line of cases, it would be churlish to take to task the court below for an identical oversight in this case. Here the court of appeals said (Pet. App. A8):

> "In 1890 and 1892, the State of Nevada by selection acquired fee simple title from the United States Government to the land now owned by the Cappaerts. The Desert Land Act of 1877, 43 U. S. C. §321 (1964), as construed in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 162 (1935), provides that a transfer of federal land out of the public domain after the date of the Act would not pass title to any unappropriated appurtenant water; water rights would be determined under the law of the state in which the land was located. Because water rights were severed from title in 1877, Nevada got no water rights in 1890 and 1892 when it acquired title to the Cappaerts' land. Therefore, the Cappaerts, as successors in interest, possess no water rights unless they or a predecessor acquired such rights under Nevada law."

The difficulty with the foregoing excerpt is that it confuses jurisdiction with proprietary rights. True, Nevada as a proprietor could acquire no water rights when the United States conveyed lands to it under the 1880 lieu selection act (*supra*, page 7). But, even before those conveyances were executed, Congress had granted Nevada jurisdiction to determine the disposition of

the water rights pertaining to all land within its boundaries. That was the plain meaning of the Desert Land Act as declared by this Court in *California Power* in 1935.

Consequently, while the Cappaerts agree that they obtained no water rights by virtue of the patents originally issued to the State of Nevada, they do assert that, when the United States executed those patents, it retained no water rights that it could thereafter reserve to itself in 1952.

D. Since 1955, the Implied Reservation Doctrine Has, Like Aaron's Rod, Swallowed Up All Other Water Right Doctrines

The implied reservation doctrine, the asserted rule (Br. Op. 4) "that the United States may, by withdrawal of public lands, impliedly reserve such appurtenant unappropriated waters as are required to accomplish the purpose for which the lands are reserved", was applied below so as to acquire, not simply surface waters, not only all underground water underlying the Devil's Hole tract of 40 acres set aside in 1952, but also every drop of underground water that may be hydraulically connected therewith, in this case all such water percolating in an aquifer 4500 square miles in extent.

How could such a far-reaching and extreme doctrine, one that plainly unsettles Federal-State relationships in the Western third of the entire nation, ever have developed?

The first formulation of the implied reservation doctrine dates from 1908, more than a quarter of a century before *California Power* was decided. *Winters v. United*

States, 207 U. S. 564. There an agreement with an Indian tribe, modifying an earlier treaty, had effected an exchange of lands; and the question was whether the lands given the Indians pursuant to that exchange had been conveyed without any water appurtenant thereto. "The lands were arid, and, without irrigation, were practically valueless" (p. 576). Since (*ibid.*) "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians", the Court construed the exchange to carry with it an implied reservation of water rights.

A similar result was reached in *Arizona v. California,* 373 U. S. 546, where the Court held that when Congress created certain Indian reservations on the Colorado River—significantly, a navigable stream—it intended to reserve enough river water to irrigate the land on those reservations. The Court said (pp. 598-599):

> "It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised."

The Cappaerts indicate below (Point II, pp. 51-56) why in their view the implied reservation doctrine applies only to Indian situations, and that it must be thus limited. Here they address themselves to a second aspect of *Arizona v. California,* that involving non-Indian lands, to the portion of the Court's opinion

wherein it was held that the principle governing water rights for Indian reservations was likewise applicable to other federal enclaves.

Examination of the Special Master's report in that case (No. 8, Orig., Oct. T. 1962; pp. 291-295, 298-300) shows that he followed the Indian cases in holding that water could similarly be reserved for other federal purposes. He said (pp. 292-293):

> "It is necessary to adjudicate the water rights of the Lake Mead National Recreation Area for the same reason that the rights of the mainstream Indian Reservations must be adjudicated. I conclude that the United States had the power to reserve water in the Colorado River for use in the Lake Mead National Recreation Area for the same reasons that it could reserve such water for Indian Reservations. Although the authorities discussed above which establish the reservation theory all involved Indian Reservations, the principles seem equally applicable to lands used by the United States for its other purposes. If the United States can set aside public land for an Indian Reservation and, at the same time, reserve water for the future requirements of that land, I can see no reason why the United States cannot equally reserve water for public land which it sets aside as a National Recreation Area. *Cf. F. P. C. v. Oregon,* 349 U. S. 435 (1955)."

This Court adopted the Special Master's conclusions, saying (373 U. S. at 601; italics supplied):

> "We agree with the conclusions of the Master that the United States *intended* to reserve water sufficient for the future requirements of the Lake

> Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and Gila National Forest."

Again, all of these areas abut the Colorado River, a navigable stream.

None the less, inasmuch as the Government and the court below are giving this portion of *Arizona v. California* a wider significance than the Cappaerts believe that it properly has, they have italicized the word "intended" in the foregoing passage because, as they go on to show in Point III, pp. 56-79, below, it is simply impossible to deduce or infer from the terms of the 1952 Proclamation the slightest trace of an intent to reserve land, much less water, for a purpose then not yet embraced by legislation, nor indeed even mentioned in that document as an object sought to be preserved.

Finally, in the two most recent cases here (*United States v. District Court for Eagle County*, 401 U. S. 520; *United States v. District Court for Water Div. No. 5*, 401 U. S. 527), all that was actually decided was that the United States had consented to be sued for adjudication of water rights pursuant to the terms of the so-called McCarran amendment (43 U. S. C. §666(a); Pet. App. No. 74-1304, xxv).

The Court assumed in both cases (401 U. S. at 522-523, 528-529) that the United States had validly reserved water rights in connection with its several federal enclaves, and the Government was told that the scope of all such reservations was a federal question,

reviewable by this Court following final state court adjudication.

The late Mr. Justice Harlan, concurring in both cases, said (401 U. S. at 530):

> "I join in the opinions of the Court in these cases, explicitly disclaiming, however, the intimation of any view as to the existence and scope of the so-called 'reserved water rights' of the United States, either in general or in the particular situations here involved."

But neither that concurrence nor the Court's opinion in either case, reflects the slightest articulated consideration, much less deliberate decision, of the head-on conflict between the implied reservation doctrine and the subjection of non-navigable water to state law pursuant to Congressional mandate, as the latter was construed in *California Power*, 295 U. S. 142, and in the cases that followed it for 16 years.

The non-Indian aspect of *Arizona v. California*, 373 U. S. 546, 601, which rests on the navigable character of the Colorado River, is not in conflict with anything in *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142; the earlier case was expressly limited to the effect of the Desert Land Act on non-navigable waters. It is only the *Pelton Dam* case, *Federal Power Comm. v. Oregon*, 349 U. S. 435, that is truly inconsistent with the basic doctrine of *California Power*, a consequence of the mistake of fact plus oversight of law that underlay the *Pelton Dam* decision.

We need spend but little time on the two district court citations relied on both by the court below (Pet. App. A6) and by the government here (Memo. Op. No. 74-1304 at 8).

1. *State of Nevada v. United States,* 165 F. Supp. 600 (D. Nev.), which involved rights to underground water for a naval ammunition depot, a tract over which Nevada had ceded exclusive jurisdiction several years before its 1939 act relating to underground water (Pet. App. D7-D8; Pet. App. No. 74-1304, xxvii), may perhaps be explained on the footing of intent. But that case was affirmed on the wholly different ground that there was no jurisdiction to entertain the action. 279 F. 2d 699 (C. A. 9). Thus every word said by the district court in that case is purest dictum, nothing more.

2. *Tweedy v. Texas Company,* 286 F. Supp. 383 (D. Mont.), was another Indian case, involving the same agreement with the Blackfeet Tribe that was considered in the *Winters* case in 207 U. S., *supra,* pp. 45-46; *infra,* pp. 51-52.

Neither case, then, is of much if indeed any authority, and reliance on such slim reeds simply underscores the significance of what the court below wholly ignored, what the Government refuses to face, and what this Court must now determine.

That is the issue, central to this case, of the utter inconsistency in non-Indian cases between the Congressional mandate severing land and water in respect of publicly-owned lands in the arid-land states, and subjecting all such non-navigable water to state law; and the later doctrine, first adopted under a combined mistake of fact plus a misreading of earlier rulings, but since then blindly followed—the contrary notion that,

whenever the United States reserves a tract of its own land for a federal purpose, it to that extent deprives the state in which that tract is located of all jurisdiction over the disposition of non-navigable waters not only adjacent to but also underlying the land so reserved.

II.

THE IMPLIED RESERVATION DOCTRINE IS PROPERLY APPLICABLE ONLY IN SITUATIONS INVOLVING INDIANS, WHO AS WARDS OF THE NATION ARE THE BENEFICIARIES OF EVERY RULE OF CONSTRUCTION, AND WHOSE INTERESTS BEING NATIONAL ARE PARAMOUNT TO THOSE OF THE STATES; AND THAT DOCTRINE SHOULD IN CONSEQUENCE BE STRICTLY LIMITED TO SUCH SITUATIONS

In assimilating the doctrine that upheld an implied reservation of water in instances where conveyances to Indians were in question to similar reservations where public land was set apart for other federal purposes, the Special Master in *Arizona v. California,* 373 U. S. 546, said (No. 8, Orig., Oct. T. 1962; Report, p. 293):

> "Certainly none of the parties have suggested a tenable distinction between the two situations."

With all deference to the eminent counsel who conducted that landmark litigation, the Cappaerts venture precisely such a distinction.

First. As has been shown (above, pp. 45-46), the doctrine of implied reservation of water rights originated in a case involving an agreement with the Blackfeet Indians. *Winters v. United States,* 207 U. S. 564. Had no water been impliedly reserved there, the lands conveyed to the Indians, being virtually valueless without

water, could simply not have been used for the agricultural purposes for which they had been transferred. "The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government" (p. 576). Accordingly, since (*ibid.*) "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians", the Court construed the exchange to carry with it an implied reservation of appurtenant water rights. As the Cappaerts have noted, this was a 1908 case, well before the *California Power* decision in 1935.

The same rule was followed in other situations involving Indians (*United States v. Walker River Irr. Dist.*, 104 F.2d 334 (C. A. 9); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (C. A. 9), certiorari denied, 352 U. S. 988; *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D. Mont.), after which it was reapplied in the Indian reservation portion of *Arizona v. California*, 373 U. S. 546, 598-599, quoted above at p. 46.

As a matter of completeness, mention should perhaps also be made of *United States v. Powers*, 305 U. S. 527, which followed the *Winters* case, although with a significant difference. In *Winters*, the exchange of land took place after the Desert Land Act that had ceded jurisdiction over non-navigable waters on the public domain to the states, see pp. 29-37, *supra;* in *Powers*, however, there was involved the Crow Treaty of 1868, which antedated the Desert Land Act. At that time, therefore, the implied reservation of water for the Indians' benefit did not and could not impinge on state or (as was alone involved there in 1868) on territorial power.

At any rate, the obvious rationale of all the foregoing cases is the rule, repeatedly announced and applied in more than a score of Indian cases here, that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164, 174. It would unduly extend this already lengthy brief to cite additional decisions to the same effect; all those are conveniently collected in vol. 8 of the *Lawyers' Edition Digest of U. S. Supreme Court Reports*, under Indians §§ 28, 21, and 13.

No similar rule of beneficent construction, it needs hardly to be added, applies to the United States itself. That powerful and omnicompetent entity cannot claim to be thus favored when it withdraws lands, not for the benefit of its Indian wards, but only for other federal purposes.

Second. The Cappaerts have shown above (pp. 29-37) how jurisdiction over non-navigable waters on publicly owned lands passed to the states by virtue of, *inter alia*, the Desert Land Act of 1877. It may well be inquired, therefore, how that proposition can be squared with the unquestioned doctrine that water rights could still be impliedly reserved for the benefit of Indian wards after 1877. If, as the Cappaerts contend, disposition of all non-navigable water had been vested in the states by 1877, how then could the United States after that date reserve any water whatever, even for Indian purposes?

The answer to this apparent inconsistency is not difficult to find. Indian rights are national in nature, and prevail over those of the states; this has been fun-

damental since the time of Chief Justice Marshall. *Worcester v. Georgia,* 6 Pet. 515. Indeed, there is an unbroken line of decisions to that same effect, through, in recent years, *Williams v. Lee,* 358 U. S. 217, and *Warren Trading Post Co. v. Tax Comm'n,* 380 U. S. 685, and terminating up to now—here also—with *McClanahan v. Arizona State Tax Comm'n,* 411 U. S. 164.

It is that principle, first enunciated by the Great Chief Justice, which explains why, even in respect of agreements, conveyances, and withdrawals subsequent to the Desert Land Act of 1877, the United States can impliedly reserve for the benefit of its Indian wards non-navigable waters that, for all other purposes, remain within the exclusive jurisdiction of the arid-land states.

Third. This result may not be entirely logical, but the same comment can fairly be made in respect of much other accepted Indian law. Thus, although a state's writ does not run on an Indian reservation, see the *Williams, Warren Trading Post,* and *McClanahan* cases just cited, Indians living on those reservations who are exempt from state taxes and from state judicial process can nonetheless elect and become county supervisors who fix those taxes for non-Indians, and whose powers have a substantial impact on the courts that function within their county. *Shirley v. Superior Court, &c.,* 109 Ariz. 510, 513 P.2d 939, certiorari denied *sub nom. Minyard v. Shirley,* 415 U. S. 917.

Similarly, although racial discrimination of every nature whatsoever has been under an increasingly restrictive constitutional ban for over twenty years, Indian preference in Bureau of Indian Affairs employment, a

condition that obviously discriminates against all non-Indians whether black or white, has been just recently sustained. *Morton v. Mancari,* 417 U. S. 535.

The touchstone, then, of Indian law, is that it is *sui generis.* Or, as Mr. Justice Holmes felicitously expressed the matter for the Court over half a century ago (*New York Trust Co. v. Eisner,* 256 U. S. 345, 349), "Upon this point a page of history is worth a volume of logic."

In sum, the Cappaerts' basic position is that, since jurisdiction over all non-navigable waters within the exterior limits of Nevada was ceded to that state in 1877; since Nevada exercised that jurisdiction by the passage of its 1913 and 1939 water appropriation acts (*supra,* pp. 36-37); and since the United States admittedly never proceeded under either of those enactments to obtain any water rights either appurtenant to or underlying Devil's Hole, no such water rights could be reserved by or for the benefit of the United States by reason of the withdrawal of the Devil's Hole tract in 1952, a withdrawal that obviously touched no Indian rights whatever.

Or, more succinctly, no water rights were or could have been reserved by the United States in 1952 because it then had no such rights available for reservation.

That conclusion follows even more clearly when it is borne in mind that the Devil's Hole withdrawal was made on January 17, 1952 (Pet. App. C1-C3), less than nine months after this Court had on May 7, 1951, by summarily dismissing the appeal in *Dority v. New Mexico ex rel. Bliss, State Engineer,* 341 U. S. 924, with the mere citation of the *California Power* case,

emphatically reaffirmed the continuing validity of that decision's doctrine, which gave effect to the cession of all jurisdiction over non-navigable waters to the arid-land states.

III.

IF, HOWEVER, THE IMPLIED RESERVATION DOCTRINE IS TO BE EXTENDED TO EVERY SITUATION WHERE AN INTENT TO APPROPRIATE WATER CAN FAIRLY BE IMPLIED FROM THE INSTRUMENT EFFECTING A LAND WITHDRAWAL, THEN THE 1952 PROCLAMATION HERE, WHICH SHOWS ON ITS FACE THAT IT DID NOT DESIGNATE THE PUPFISH EITHER AS OBJECTS OF SCIENTIFIC INTEREST OR DECLARE THEM WORTHY OF PROTECTION, PLAINLY DID NOT INTEND TO RESERVE ALL UNDERGROUND WATER FROM AN AQUIFER 4500 SQUARE MILES IN EXTENT, FOR A PURPOSE NOT RECOGNIZED BY CONGRESS UNTIL 1966, NOR FOR THE BENEFIT OF A MARINE SPECIES NOT DECLARED ENDANGERED UNTIL 1970

Even if the Cappaerts' preceding contentions should be rejected, even if this Court should hold that, notwithstanding the Desert Land Act of 1877 and notwithstanding the doctrine of state jurisdiction formulated in *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142, the sole criterion for the implied reservation of water rights in connection with any reservation of public lands for any purpose whatsoever is whether the Government "intended" to reserve such water rights in connection with the withdrawn land, the ruling below is still wrong, and must in consequence be reversed.

For, as the Cappaerts will now demonstrate in detail, the terms of the 1952 Proclamation utterly negative any intent whatsoever to reserve vast quantities of under-

ground water, much less to do so for the benefit of a peculiar breed of desert fish, which it did not even mention as an independent object of scientific interest, whose protection was never even authorized by Congress before 1966, and who were not themselves effectively declared an endangered species pursuant to such authorization before 1970.

A. The 1952 Proclamation Could Not Have "Intended" to Reserve Any Water Rights Because at That Time the California Power Doctrine, That Congress Had Ceded to the Arid-Land States All Jurisdiction Over Non-Navigable Waters, Was Still Fully in Force

Even more important than textual analysis is consideration of the scope of the 1952 Proclamation in the context of its contemporary legal climate.

The date of that instrument is January 17, 1952 (Pet. App. C3).

Less than nine months previously, on May 7, 1951, the Court had, in *Dority v. New Mexico ex rel. Bliss, State Engineer*, 341 U. S. 924, dismissed the appeal from *State v. Dority*, 55 N. M. 12, 225 P.2d 1007, on the ground that it did not involve a substantial federal question, citing *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142.

Thus, when the 1952 Proclamation was issued, it was still the law that, when Congress effected the severance of land and water on the public domain, it had ceded jurisdiction over all such water, being non-navigable, to the several arid-land states. See pp. 29-37, *supra*. And, at that time, the single implied reservation case up to then decided, which antedated *California Power*

by over a quarter of a century, was expressly rested on the rule that agreements with Indian tribes were to be construed in those tribes' favor. *Winters v. United States,* 207 U. S. 564.

The first extension of the implied reservation doctrine, the first limitation on the cession of jurisdiction doctrine (however unwitting it may have been), followed the basic 1952 Proclamation here by more than four years. *Federal Power Comm. v. Oregon,* 349 U. S. 435 (the *Pelton Dam* case).

Consequently, looking at the 1952 Proclamation in the light of what was intended thereby at the precise moment when it was promulgated, any knowledgeable lawyer would have been bound to conclude that it reserved only the 40-acre tract specified therein, and that it never for a single moment "intended" to reserve even a single drop of water. For, with the limited exception of lands involving agreements with the Indians, jurisdiction over all non-navigable water, by every pronouncement of this Court up to that time, had long since been transferred by Congress to the several arid-land states.

B. The Text of the 1952 Proclamation, the Sole Basis of the Government's Case, Mentions Pupfish Only to Confirm the Remarkable Geological Significance of the Pool It Reserved, and Neither Declares Them to Be of Scientific Interest nor to Be Themselves Worthy of Protection

It is common ground between the parties that, in the court below, "The existence of the government's water right was based not on the Endangered Species Acts but on the establishment of the Devil's Hole National Monument in 1952" (Br. Op. 4 note 3). There, however, agreement ends, because in the Cappaerts' view both courts below egregiously misread both the terms and the statutory setting of the 1952 Proclamation (Pet. App. C1-C3).

To begin with, the Proclamation declares that the *pool* is remarkable, and recites that the "said *pool* is of such outstanding scientific importance that *it* should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of said [Death Valley] monument" (Pet. App. C2, italics added).

The only reference in the Proclamation to the pupfish appears in the fourth of its five preambles, where they are mentioned solely as "geologic evidence"—not as biologic or zoologic or ichthyologic evidence—to confirm "that *this subterranean pool* is an integral part of the hydrographic history of the Death Valley region" (Pet. App. C1, C2; italics added).

There is not a single word in the 1952 Proclamation designating the pupfish as independent objects of scientific interest, much less a syllable therein declaring them worthy of or entitled to protection. The pupfish are referred to simply as geologic evidence enhancing and confirming the scientific importance of the pool being reserved.

Let us leave the preambles, and turn to the text.

The Proclamation simply reserves "the following-described tract of land in Nevada", identifying it by township, range, and section.

Unauthorized persons are warned "not to appropriate, injure, destroy, or remove any feature of this addition to the said [Death Valley] monument and not to locate or settle on any of the *lands* thereof". The Cappaerts

have italicized the word "lands" to emphasize that there was no warning whatever against pumping underground water from wells miles away from the newly reserved tract.

The Cappaerts emphasize even more strongly that both the court below (Pet. App. A7) and the Government here (Br. Op. 5) badly misread the 1952 Proclamation.

1. Here is the first sentence of the pertinent paragraph in the opinion below (Pet. App. A7):

> "The fundamental purpose of the reservation of the Devil's Hole pool was to assure that the pool would not suffer changes from its condition at the time the Proclamation was issued in 1952; that condition included the pool's unique inhabitants, the pupfish."

The foregoing quotation is, in its entirety, not simply interpolation but indeed invention. The court below was actually rewriting the Proclamation, because none of the matter just quoted from the opinion can possibly be found in the language of the earlier document.

Then the opinion continues (Pet. App. A7):

> "The Proclamation referred to the significant contribution of the pupfish to the scientific importance of the Devil's Hole pool; it implicitly reserved enough groundwater to assure preservation of the pupfish."

The clause after the semicolon is a conclusion of law, adequately answered throughout this brief; but the first clause is a transparent misreading of the document. The Proclamation said that the presence of the pupfish supplied geologic evidence confirming the scientific importance of the pool, not that the pupfish contributed to that importance. The fifth preamble, about to be quoted, is simply not susceptible of the meaning that the court below fashioned for it (Pet. App. C1-C2):

> "WHEREAS the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region;"

2. The government also misreads the Proclamation, though perhaps not with equal disregard of its text (Br. Op. 5, italics added):

> "As to the scope of the proclamation, it is clear from its wording that President Truman intended to preserve Devil's Hole in its natural setting and that *one of the primary reasons the hole and pool were deemed worthy of protection was precisely because the unique pupfish live in it.*"

Once again, the text does not support the gloss now placed upon it. The text clearly shows that the pool was deemed worthy of protection because *it* was deemed "remarkable," because *it* was "a unique subsurface remnant", and because *it* was "of such outstanding scientific importance" (Pet. App. C1-C2)—qualities that were confirmed, not "because the unique pupfish live in it" (Br. Op. 5), but simply because

their presence confirmed the geologic evidence of the pool's being "an integral part of the hydrographic history of the Death Valley region".

If the above few paragraphs appear labored, it is because it is frequently a laborious task to point out precisely how and why a document has been distorted and its meaning altered; textual criticism will never read as smoothly as a novel—although indeed the qualities attributed to the 1952 Proclamation by the court below and by the Government in this Court do involve much of the purely fictitious.

Wishful thinking is, of course, a fact of life in a troubled world. But it is a poor tool for ascertaining the meaning of an official document written in clearly expressed English.

C. The Record Lays Bare the Dissimulation That Underlay the Preparation of the 1952 Proclamation

The Cappaerts could mention, though they need not invoke, the rule that, when the body of any document is clear—and there is surely nothing even vaguely ambiguous in the operative paragraphs of the 1952 Proclamation that begin with "NOW, THEREFORE, I HARRY S. TRUMAN"—when the body of any document is clear, its scope cannot be varied by anything in a preamble. *Price v. Forrest,* 173 U. S. 410, 427; *Yazoo Railroad Co. v. Thomas,* 132 U.S. 174, 188. For, even if the law were otherwise, there is, as has been shown, absolutely nothing in the pupfish preamble that even purports to include them along with the pool as being of scientific interest and hence as being worthy of protection.

This record explains that omission. This record shows that the enthusiastic ichthyologist who after a long campaign extending over about a dozen years persuaded the National Park Service to seek the 1952 Proclamation was well aware that the law as it then stood did not empower that agency to obtain land for the purpose of protecting endangered species. Consequently "the one that was chiefly instrumental in getting the Devil's Hole set aside * * * had come up with this idea of pointing out the travertine deposit as a means of getting Devil's Hole set aside" (A. 131).

The record further shows that this step "was done ostensibly because of the unique travertine limestone formations, but not to protect *Cyprinodon diabolis,* the unique fish inhabitant" (Defts. 1972 Ex. B at A. 319).

The record additionally shows (A. 169) that, about a dozen years after the sponsors of the Devil's Hole reservation first urged its establishment, they "were successful in convincing the [National Park] service that the hole was worthy of inclusion in the monument. In doing so, they cited an unusual travertine limestone formation in the hole as a pretext, since park service policy at that time did not consider saving a rare animal species sufficient reason for acquiring land."

"Had come up with this idea", "ostensibly", "pretext"—such words are, all too plainly, the language of subterfuge. Yet that technique succeeded brilliantly in the court below, which held that, although the sponsor of the 1952 Proclamation fully recognized that national monuments could not then be lawfully created to protect endangered species, that Proclamation would nonetheless be construed to reach precisely that legally unattainable result.

Rarely, if indeed ever before, have contrivance, cunning, and guile achieved such signal success in a court of the United States.

D. Both the Text and the Legislative History of the Only Statute on Which the 1952 Proclamation Purported to Rely Negative Any Authority to Set Aside Public Lands for the Protection of Living Species, Much Less Any Appurtenant Water

Not only did the court below badly misread the 1952 Proclamation, it grossly misapplied the statute on which that Proclamation purported to rely.

That fault was primarily the consequence of inadequate and mistaken technique, specifically of citing every statutory provision to "U. S. C. (1974)" or to "U. S. C. (1964)", as though the United States Code represented a single act of creation, rising like Venus fully formed from the foam.

Such citations in the opinion below thus compress numerous statutory enactments over a 96-year long period into a single simultaneous expression: The Desert Land Act of 1877 (Pet. App. A8); the 1906 Act for the preservation of American antiquities (Pet. App. A5); the 1916 Act establishing the National Park Service (Pet. App. A7); the McCarran Amendment of 1952 (Pet. App. A12); and the last of the three Endangered Species Acts, that of 1973 (Pet. App. A2).

Citations of that character to the Code alone inevitably result in error, if indeed they do not affirmatively

invite it—because an approach thus undiscriminating violates two settled rules of statutory construction.

First, the Code is, by its own terms (1 U. S. C. §204(a)), only *prima facie* the law—unless actually reenacted as positive law, which is not yet true of either Title 16 (Conservation) nor of Title 43 (Public Lands). See *Stephan v. United States,* 319 U. S. 423, 426.

Second, in order to ascertain the true intent of Congress, subsequent codification, even when it constitutes positive law, must be disregarded. *Nye v. United States,* 313 U. S. 33; *Williams v. United States,* 327 U. S. 711.

Accordingly, the Cappaerts here have set out in the original the only enactment relied on as authority in the text of the 1952 Proclamation, the 1906 Act for the preservation of American antiquities (Pet. App. D1-D2).

The first section of that Act imposes penalties on "any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States."

The second section authorizes the President "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as

a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." A proviso then authorized the acceptance of tracts in private ownership on which such objects were situated.

The third section provides for the issuance of "permits for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity on such lands" to qualified institutions, provided that "the examinations, excavations, and gathering are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums."

The Cappaerts pause to emphasize that on the very face of the statute under whose sole authority Devil's Hole was reserved, there is not only no mention whatever of living creatures, who plainly would not be described as suitable "for permanent preservation in public museums", but that there is an express command that the parcels to be reserved for national monument purposes shall "in all cases be confined to the smallest area compatible with the proper care and management of the objects to be protected." Thus the statute necessarily relied upon by the Government here wholly negatives any reservation whatever for the benefit of pupfish, much less an implied reservation in connection therewith of all underground water from an aquifer

72,000 times greater than the tract actually reserved (1/16 sq. mi. as opposed to 4500 sq. mi.).

Indeed, even on the face of the statute, within its own four corners, one will search in vain for the slightest suggestion that it was ever designed to affect even a single drop of water anywhere.

The legislative history of the 1906 Act strongly emphasizes its restricted scope and its essentially archeological character.

That Act originated as S. 4698 of the 59th Congress, and the first committee report thereon (Sen. Rep. No. 3797, 59th Cong., 1st sess.) simply said:

> "This measure has the hearty support of the Archaeological Institute of America, the American Anthropological Association, the Smithsonian Institution, and numerous museums throughout the country, and in view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics and for the use of museums and colleges, etc., your committee are of the opinion that their preservation is of great importance."

Pursuant to that report, the bill passed the Senate without amendment or even a word of debate (40 Cong. Rec. 7331).

The House Report (H. R. Rep. No. 2224, 59th Cong., 1st sess.) concerned itself almost exclusively

with the archeological aspects of the proposed legislation; here are representative excerpts (p. 1):

> "The various archeological societies of the United States in the Fifty-eighth Congress presented the subject of the enactment of a bill along the lines proposed in the present bill.
>
> * * * * * * *
>
> "The bill as above amended will, in the opinion of your committee, accomplish the purpose desired. There are scattered throughout the Southwest quite a large number of interesting ruins. Many of these ruins are upon the public lands, and most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."

Included in the House Report at pp. 2-3 was a "Memorandum concerning historic and prehistoric ruins of Arizona, New Mexico, Colorado, and Utah, and their preservation", prepared by Professor Edgar L. Hewett, formerly president of the Normal University of New Mexico, and which stated in part:

> "The importance of the large number of historic and prehistoric ruins scattered over the semiarid regions of the southwestern part of the United States has gradually come to be recognized. Every cliff dwelling, every prehistoric tower, communal house, shrine, and burial mound is an object which can contribute something to the advancement of knowledge, and hence is worthy of preservation. Knowledge of the extent, location, and nature of these ruins has been accumulating for

> many years. We now know them to be very numerous and of great value.
>
> * * * * * * *
>
> "Unquestionably some of these regions are sufficiently rich in historic and scientific interest and scenic beauty to warrant their organization into permanent national parks. Many others should be temporarily withdrawn and allowed to revert to the public domain after the ruins have been examined by competent authorities, the collections thereon properly cared for, and all data that can be secured made a matter of public record."

On the House floor, the Senate bill was managed by Mr. Lucey of Iowa; when it was called up the following colloquy took place (40 Cong. Rec. 7888):

> "Mr. STEPHENS of Texas: Will that take this land off the market, or can they still be settled on as part of the public domain?
>
> "Mr. LUCEY: It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.
>
> "Mr. STEPHENS of Texas: How much land will be taken off the market in the Western States by the passage of the bill?
>
> "Mr. LUCEY: Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved.
>
> "Mr. STEPHENS of Texas: Would it be anything like the forest reserve bill, by which seventy or eighty million of acres of land in the United States have been tied up?

"Mr. LUCEY: Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserves the forests and the water courses."

Notwithstanding—or, more likely, without knowledge of the foregoing legislative history—the Court in *Cameron v. United States,* 252 U. S. 450, 455-456, held that the 1906 Act authorized the creation of the Grand Canyon National Monument:

> "The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing 'objects of historic or scientific interest'. The Grand Canyon, as stated in his proclamation, 'is an object of unusual scientific interest'. It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors."

As a matter of statutory construction in the strict sense of ascertaining the intent of Congress, it seems clear that the "other objects of historic or scientific interest" mentioned in Section 2 of the 1906 Act, which authorized the President to proclaim reservations, were meant to include only what could fairly be comprehended within "any object of antiquity" whose destruction, &c., was prohibited by Section 1, and within

the "objects of antiquity" that Section 3 directed to be saved "for permanent preservation in public museums". That conclusion is strongly fortified by the committee reports and by the only floor debate on the measure.

But, when the *Cameron* case was decided, more than half a century ago, resort to legislative history was far less common than it has since become; Cameron appears not to have invoked it in argument, see 252 U. S. at 454; nor had anyone then yet formulated "the canon of contruction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States,* 350 U. S. 366, 374. Consequently, in a very real sense, the *Cameron* case is itself an artifact, a legal survival from an earlier era of statutory interpretation.

The Cappaerts, however, are not disposed to assail the legitimacy of the Grand Canyon at this point, "to question which would be to lay hands on the Ark of the Covenant" (Holmes J. in *Springer v. Philippine Islands,* 277 U. S. 189, 209, 211). Because, however doubtful in law its original creation, its existence as an area reserved for the enjoyment and instruction of the public has been repeatedly confirmed and ratified by Congress, which has from time to time enlarged its exterior boundaries. 16 U. S. C. §§221-228.

Devil's Hole, however, is different, legally and factually.

The factual difference is that while the Grand Canyon is "one of the great natural wonders" that "annually draws to its borders thousands of visitors"—actually, at this time, millions—the "remarkable underground pool known as Devil's Hole" (Pet. App. C1) is fenced in by lock and key and can be viewed only by the elite of the

zoological and the ichthyological communities (*supra,* p. 10).

The legal difference is that there is no trace of Congressional ratification of the Devil's Hole addition to the Death Valley National Monument.

Those differences may well be sufficient to induce the Court to declare that the 1906 Act for the preservation of American antiquities extends only to the artifacts that are appropriate "for permanent preservations in public museums", and that it does not include merely natural phenomena, much less underground water or indeed non-navigable water of any kind.

But that is a question that the Cappaerts need not pursue. It is sufficient for them that the 1952 Proclamation nowhere, either in its preambles or in any portions of its operative text, ever declared the pupfish themselves to be objects of historic or scientific interest. Indeed, if that Proclamation had even purported to do so, then such a declaration would have been wholly unauthorized by the terms of the only legislation on which it relied, and wholly beyond the underlying purpose of that statute as disclosed by its luminous legislative history, one that is quite free from the slightest doubt.

The Cappaerts now deem it appropriate to mention, simply to show that it has not been overlooked, Section 1 of the 1916 Act creating the National Park Service, now set out in 16 U. S. C. §1 (Pet. App. D6), which indeed provides that "the fundamental purpose" of national parks and monuments is "to conserve the scenery * * * and the wild life therein", and which was in consequence relied on by the court below to reinforce its conclusion that the 1952 Proclamation "implicitly reserved enough groundwater to assure preservation of the pupfish" (Pet. App. A7-A8).

In this Court, also, the Government quotes that statute (Br. Op. 5), somewhat more fully and indeed with emphasis added.

Of course the creation of the National Park Service was intended to continue, through centralized administration, existing protection of bears and bison, of deer and wildcats, and of all other flora and fauna to be found within parks and monuments then in existence. Of course similar protection was to be extended to like reservations thereafter created.

But we are here concerned with the interpretation of a 1952 Proclamation purporting to be issued under authority of the 1906 Act for the preservation of American antiquities. As has been seen (*supra,* pp. 10-11, 58-62), that Proclamation refrained from extending protection to pupfish. Consequently it is not helpful to attempt to include in its text what is not therein, simply by looking to the generalized provision of a measure establishing a new agency, one whose duties would include the operation of many varied areas—national parks, national monuments, national historical areas, national recreation areas, each of which represents a different public interest warranting protection.

If the 1952 Proclamation is fairly read according to its plain terms, then additional reference to 16 U. S. C. §1 is, at its very highest, an ornamental citation. But if that Proclamation is misread, as both the court below and the Government here have plainly done, then reliance on that portion of the statute establishing the National Park Service simply underscores the barrenness of authority to sustain the ruling now being reviewed.

E. Since Congress Did Not Adopt the Protection of Endangered Species as a Public Purpose Until 1966, the Government Is Obviously Urging ex Post Facto Effect for Legislation Subsequent to the 1952 Proclamation

Although the court below asserted (Pet. App. A2) that the pupfish "have been designated an endangered species under the Endangered Species Act of 1973, 16 U. S. C. §1533 (1974), 50 C. F. R. §17", in fact they were so designated in 1970 (35 Fed. Reg. 16047), pursuant to the earlier acts of 1966 and 1969—another error stemming from that tribunal's inadequate statutory techniques.

According to the Government's present position, it places no reliance on any of the three endangered species acts to establish its presently claimed water rights. Opposing certiorari in this case, the Solicitor General said (Br. Op. 4, note 3; italics added):

> "In regard to the Endangered Species Acts dating from 1966, which petitioners discuss at Pet. 18-19, *these Acts were mentioned by the court below only to demonstrate that a congressionally-established public policy would be frustrated should an injunction fail to issue.* The existence of the government's water right was based not on the Endangered Species Acts but on the establishment of the Devil's Hole National Monument in 1952."

There is an obvious inconsistency in the foregoing paragraph: If, as the Government now clearly agrees, whatever rights the United States may have today were fixed in 1952, then those rights cannot possibly be enlarged by any public policy thereafter formulated or established by the Congress. Consequently it cannot be

material to a reservation of land effected in 1952 that, properly construed, such reservation does not effectuate what was not enacted into law until much later. The Government seems to argue that it is seeking to prevent frustration, when, all too clearly, it is actually attempting to give *ex post facto* effect to the endangered species legislation.

F. As Late as 1971, the Government Made No Claim to Any Underground Water on Lands More Than One Mile From Devil's Hole, Because Its Hydrological Experts Then Foresaw No Effect From the Pumping of Water on More Distant Tracts

The record shows how, when the Cappaerts were negotiating their exchange of lands with the Government in 1969, National Park Service protests against any such exchange less than a mile from Devil's Hole because of potential disturbance to the pupfish, resulted in that exchange not including any land less than one mile distant from Devil's Hole (*supra*, pp. 7-8). And the record also shows that the Government's expert hydrologist advised the Cappaerts' representative, two years later and before the drilling of Wells Nos. 16 and 17, that pumping from tracts distant more than one mile from Devil's Hole would not affect the water level in the pool (*supra*, pp. 17-18). That expert's later effort to qualify his earlier statement (*ibid.*) simply recalls the notorious testimonial fudging on the part of the F.B.I. agent that was considered in *Von Moltke v. Gillies*, 332 U. S. 708, 716 note 3, 730.

The Cappaerts draw attention to the foregoing, not to lay the predicate for an estoppel, but simply to emphasize that, if the touchstone of an implied reservation of water is to be intent, see *Arizona v. California*,

373 U. S. 546, 601 (quoted *supra*, pp. 47-48), then plainly, President Truman could not have "intended" in 1952 to reserve underground water from tracts so far distant from the 40 acres being withdrawn that in 1971 the Government's hydrological expert could foresee no effect on the level in Devil's Hole if water were pumped from those tracts.

Thus, even assuming for purposes of present argument that the 1952 Proclamation was "intended" to reserve some water for the pool being set aside by its terms, it is crystal clear, indeed it is pikestaff plain, that the President could not possibly have intended to reserve in 1952 underground water that his most learned and knowledgeable expert even more than 19 years later would have told him would be without any effect on the "remarkable underground pool known as Devil's Hole" (Pet. App. C1).

Yet this was the same expert who the following year testified that pumping anywhere along the 4500 square mile aquifer would eventually affect the water level in Devil's Hole (A. 78-80, 99-101).

In short, whether the 1952 Proclamation be read by the law's so conveniently created individual, the reasonable man, or indeed whether it be examined by one learned in the legal rules governing the public lands of the United States, it is impossible to find in its text anything that by a fair intendment thereof could conceivably be construed to embrace all that the court below—and the Government here—purported to read into it, namely, the prohibition of all pumping of underground water from an aquifer 4500 square miles in extent, whenever such pumping will lower the water level in the Devil's Hole pool—which covers only about 650 square feet (Opinion below, Pet. App. A2).

G. All of the Endangered Species Acts Contain Authority to Condemn Lands for the Purpose of Protecting Such Species, and, Absent Condemnation Proceedings Pursuant to Which the Cappaerts Would Be Compensated, Their Farm Property May Not Be Taken From Them to Protect the Pupfish

There are a number of issues in the present litigation that this Court will never need to determine.

Thus, it will not be called on to decide whether the particular species of pupfish now in the Devil's Hole pool can be successfully transplanted to other pools so that their survival in another habitat will be assured. At the district court hearing in 1973, substantial Government expert testimony was adduced to show that such transplants in the Hoover Dam refugium, made after the 1972 hearing in this case, had apparently been successful (Defts. 1973 Ex. E; 1973 Tr. 50-53, 256-257, 260; not printed).

Nor need the Court determine whether the pupfish now in Devil's Hole can survive there if the water level in that pool is lowered to 3.3 feet, the depth fixed by the court below during the pendency of both sets of appeals, or whether the higher 3.0 level, twice fixed by the district court, is necessary to their survival (*supra*, pp. 20-21).

The Cappaerts deem it appropriate to note in passing that the periodic reports of the Special Master and the pupfish censuses taken during the appellate travel of this litigation indicate that, even at the lower 3.3 level —which constitutes the subsistence and indeed the survival level of their own farm operation—the pupfish population has remained stable.

Those two questions are factual, and were not presented in either petition for certiorari granted in this case.

Finally, this case does not require the Court to arbitrate the conflicting claims of the two endangered species, pupfish and individual farmers, which, in a dramatic sense, the litigation at bar involves. There is no occasion for the Court to weigh the contentions of *Cyprinodon diabolis,* the unique desert fish whose population seems stabilized at 200 or more specimens, against those of the Cappaerts, members of the rapidly declining breed of individual farmers, whose Spring Valley Ranch in Nye County, Nevada, provides the community with wheat and cattle, bread and meat, and moreover keeps over 80 hands constantly employed.

Such a "value judgment" is for the Congress to make —and for the Congress alone.

That body, in three separate Acts for the protection of endangered species, has indicated that the pupfish warrant protection and preservation. But, in each of those Acts, Congress made provision for the acquisition of lands and water and interests therein, by purchase, donation, "or otherwise"—the latter two words a clear if sugar-coated reference to the power of eminent domain (*supra,* pp. 13-15).

If Congress and the Executive concur in holding that the Devil's Hole pupfish are more worthy of continued existence than the Cappaerts' farm, in other words that pupfish are to prevail over people, then they should either purchase that farm together with all its apparent

water rights granted by what on its face was competent authority—or they should condemn the entire enterprise, paying just compensation therefor. Neither, however, whether acting jointly or separately, can take that property away from the Cappaerts without affording them compensation, as the United States has up to now succeeded in doing in the present proceeding.

The Cappaerts are not insensible to the national interest in protecting and preserving endangered species. But if they are required to contribute to such protection at the cost of substantial damage to their own lands and to their own and to their employees' means of livelihood, then they submit that they are entitled to compensation for all such contributions—as is indeed provided for in the several Acts of Congress for the benefit of endangered species.

In sum, the Cappaerts rely upon the principle enunciated by Mr. Justice Brandeis for a unanimous Court in *Louisville Bank v. Radford,* 295 U. S. 555, 602, which requires only minimal paraphrase to be fully applicable to their own situation here:

> "* * * the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual farmers in order to protect the continued existence of pupfish located many miles away, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

IV.

INASMUCH AS THE UNITED STATES DID NOT COMPLY WITH STATE PROCEDURES FOR ESTABLISHING THE EXISTENCE OF ITS WATER RIGHTS, AND DID NOT APPEAL FROM THE STATE ENGINEER'S GRANT OF PUMPING PERMITS TO THE CAPPAERTS, IT IS BARRED FROM ASSERTING THOSE IDENTICAL CLAIMS TO WATER IN A LATER INDEPENDENT ACTION

As the Cappaerts have pointed out (*supra,* page 3), they feel free to discuss the above issue, inasmuch as it was presented by the intervenor, the State of Nevada, in its petition in No. 74-1304, which sought and obtained review of the identical judgment that they attack in their own case, No. 74-1107.

Both sets of petitioners, therefore, join in contending that, since the United States never proceeded under Nevada law to establish its rights to the claimed underground water, and, since it failed to appeal its unsuccessful protests over the grant of such water rights to the Cappaerts, it cannot do so now in this later, independent, and wholly collateral proceeding. That contention rests on two grounds, which will be discussed seriatim, although the second is probably simply a specialized application of the first.

A. Where a Specific Administrative Procedure Has Been Prescribed for the Adjudication of Particular Claims and Contentions, the Losing Party Cannot Thereafter Relitigate the Same Subject-Matter in an Independent Judicial Proceeding

The contention contained in the foregoing subheading can be set forth in virtually syllogistic fashion.

1. By the Desert Land Act of 1877 at the latest, Congress had granted to the several arid-land states

and territories all jurisdiction over non-navigable waters on the public domain. *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142, and cases following it, *supra,* pp. 29-37.

2. Where, as here, state law prescribes an administrative procedure to be followed as a prerequisite to the establishment of water rights, in this instance ch. 533 and 534, Nev. Rev. Stat., then such procedure must be followed by every claimant seeking such rights, and independent judicial proceedings collaterally attacking the earlier results cannot be maintained.

The authorities supporting the second proposition are legion, and over nearly 60 years have dealt with many and varied administrative procedures prescribed by statute. In every one of those instances, the result has been the same: The party dissatisfied with the result it obtained in the administrative tribunal is not free to bring a collateral proceeding in a judicial forum to relitigate the unfavorable administrative result.

This has been ruled where the earlier contest took place before the Interstate Commerce Commission (*Louisville & N. R. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288); or before the immigration authorities in a deportation matter (*Kessler v. Strecker,* 307 U. S. 22); or before a departmental board of contract appeals (*United States v. Bianchi & Co.,* 373 U. S. 709; *United States v. Utah Constr. Co.,* 384 U. S. 394); or before the Federal Maritime Commission (*Marine Terminal v. Rederi. Transatlantic,* 400 U. S. 62); or before the Federal Trade Commission (*United States v. Willard Tablet Co.,* 141 F.2d 141 (C. A. 7)): or before an adjustment board convened under the Railway Labor Act (*Bower v. Eastern Airlines,* 214 F.2d 623 (C. A. 3));

or before a National Labor Relations Board trial examiner (*Paramount Transport Sys. v. Chauffeurs, etc., Local 150,* 436 F.2d 1064 (C. A. 9)).

That principle is one of general application, not one to be denigrated by seeking, as the court below did here (Pet. App. A16), to minimize the scope of *res judicata* when applied to determinations made by administrative agencies.

In all such situations, the disappointed administrative suitor must pursue the appellate remedy prescribed by the statute under which he originally proceeded; he cannot retry his claim *de novo* in a separate judicial proceeding, least of all in today's condition of crowded court dockets everywhere. For, as this Court some time back pointed out, and not for the first time (*United States v. Morgan,* 313 U. S. 409, 422)—

> "It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States v. Morgan,* 307 U. S. 183, 191."

The Cappaerts content themselves with simply outlining the foregoing argument. There is no need for them to articulate it in further detail, as that will be comprehensively done, not only by the State of Nevada, intervenor in this case and petitioner in No. 74-1304, as well as by the several *amici* in both cases, but also, no doubt with varying emphases, by the petitioners in another case to be argued here this Term (*Colorado &c. District v. United States,* No. 74-940; *Akin v. United States,* No. 74-949), in which certiorari was

granted to review the Tenth Circuit's ruling in *United States v. Akin,* 504 F.2d 115.

If the contentions of the several petitioners in the cases just mentioned are sustained on this point, then, very obviously, since the United States admittedly never invoked the Nevada Act relating to underground waters, ch. 534, Nev. Rev. Stat. (Pet. App. D7-D8; Pet. App. No. 74-1304, xxvii; *infra,* page 97), in order to establish any rights to underground water in and around Devil's Hole, it was not free thereafter to assert such claims in an independent proceeding in a United States court.

B. Inasmuch as the United States in Protesting the Grant of Well Pumping Permits to the Cappaerts Invoked the 1952 Proclamation and Made Precisely the Same Contentions Before the State Engineer as It Has Made and Is Still Making in the Present Litigation, It Is Barred by the Doctrine of Res Judicata From Relitigating the Same Issues

As has been seen (*supra,* pp. 18-19), in protesting the grant of water pumping permits to the Cappaerts before the State Engineer, the representative of the United States made precisely the same contentions, of law and fact alike, that the United States has consistently advanced during the course of the present litigation.

He protested that to permit the Cappaerts to pump their wells would endanger the continued existence of the pupfish, and he relied on the 1952 Proclamation in support of his contention. Indeed, by saying (A. 287) that "The 'peculiar race of desert fish' was cited by the President as a primary reason for protecting Devil's Hole", he distorted the language of that document just

as the court below did and just as the Government is doing here—although it must be conceded that his misreading substantially exceeded either of theirs.

Thus the present independent action by the United States is simply a collateral relitigation of what had been decided against it by the State Engineer, a ruling that it did not deign to review judicially as it could have done under Nevada law (Nev. Rev. Stat., 534.030.3 and 533.450, *infra*, pp. 94-97), and in respect of which it could thereafter have sought further review here in respect of every federal question involved. *United States v. District Court for Eagle County*, 401 U. S. 520.

The State of Nevada, accordingly, contended below that "the doctrine of res judicata bars the Government from collaterally attacking the decision of a state administrative body—here the State Engineer" (Pet. App. A13).

The court below, however, rejected that contention, on several grounds: "The United States was not a party to those proceedings, nor was it ever served with process" (Pet. App. A14). "The [field] solicitor [for the National Park Service] did not raise the jurisdictional issue or any of the legal issues which the United States had the right to assert" (Pet. App. A14). "The State Engineer did not have the authority to adjudicate the water rights of the United States because the United States did not waive its sovereign immunity" (Pet. App. A14). "The proceeding before the State Engineer of Nevada was not a 'general adjudication' " (Pet. App. A15). "Although the State Engineer may have expertise in the administration of Nevada's water laws, there is no evidence that he is qualified to consider or decide

the complex issues of federal law involved in this case" (Pet. App. A16).

There are compelling answers to each step in the reasoning of the court below, some of which indeed verge on the captious.

1. The United States formally appeared for all purposes; its representative participated in the proceedings; and it litigated there the very same issues of law and fact that it is now still litigating in the present case.

2. The extent to which the Government's representative articulated his arguments is of course unimportant; what matters is that he invoked the 1952 Proclamation, and adduced evidence of the asserted damage that the Cappaerts' pumping would inflict on the pupfish.

3. It is of course quite immaterial that he was only a Field Solicitor of the Interior Department (not just of the Park Service, as the court below mistakenly said). What is important is that he represented the same National Park Service interest in endangered species that the Solicitor General of the United States represents in this Court. Surely there is no rule of law declaring that the United States is bound by the results of earlier litigation only when its highest-ranking law officers have filed a formal entry of appearance.

4. Nor is it even remotely pertinent that the State Engineer's qualifications were primarily hydrological rather than juristic; for if his decision was deemed wrong, there was a path available for redressing it, all the way to this Court (*supra*, p. 84).

Accordingly, the consequence of all the facts just recited, all of which plainly appear in the present record, is that the United States is now barred from further litigation of the Cappaerts' rights to the underground

water that they pump from their lands. That much follows from a decision that is substantially stronger. *United States v. Silliman,* 167 F.2d 607, certiorari denied, 335 U. S. 825.

The decision just cited, which arose out of the Hackfeld Alien Property fraud, requires explanation of its background, background that is complex and that can only be assembled from many widely scattered reports.

Briefly, Hackfeld was a German subject living in Germany whose property located in Hawaii was seized by the U. S. Alien Property Custodian in 1918. Because of his German nationality, Hackfeld was entitled to a return of only 80% of his seized property, and that only after the passage of the Settlement of War Claims Act of 1928, c. 167, 45 Stat. 254.

But, in 1924, Hackfeld and his attorney, one Silliman, succeeded in persuading Attorney General Harlan F. Stone and Secretary of State Charles E. Hughes that he had actually been an American citizen since the time of the Hawaiian Organic Act of April 30, 1900, c. 339, 31 Stat. 141; that during all of the intervening years he had believed himself to have been an American citizen; that his physical presence in Germany during the (first) World War, which made him an "enemy" within the Trading with the Enemy Act (see, e. g., *Juragua Iron Co. v. United States,* 212 U. S. 297), was a consequence of family illness; and that he had been unreservedly loyal to the United States during the war. Accordingly, he was issued an American passport, and the proceeds of his seized property were thereupon returned to him.

Thereafter, following Hackfeld's death, his ancillary executor in the United States—again represented by Silliman—was instrumental in obtaining a Congressional reference in the Court of Claims under §151 of the Judicial Code (old, i. e., pre-1948, 28 U. S. C. §257), to determine whether the true value of what had been seized in 1918 was more than the proceeds thereof that were returned in 1924.

The Government then investigated, after which it brought a cross-action against the ancillary executor in the Southern District of New York, inasmuch as no counterclaim could be filed in a Congressional reference.

In that action it was established that virtually every representation that Hackfeld and Silliman had made in 1924 was false, and also that, as a matter of Hawaiian law, Hackfeld had never acquired Hawaiian nationality so as to be collectively naturalized as an American by the Hawaiian Organic Act. The misrepresentations made on Hackfeld's behalf were moreover compounded by a cash payment that Hackfeld had himself made to the U. S. Consul whose favorable report was the determinative factor in the grant of Hackfeld's American passport. *Rodiek v. United States,* 100 Ct. Cl. 267, 275. Accordingly, the United States recovered judgment for the difference between what Hackfeld had received in 1924 as an American citizen and the largest sum to which he would ever have been entitled as a German, plus interest from the date of each payment. *United States v. Rodiek,* 117 F.2d 588 (C. A. 2), rehearing denied with opinion, 120 F.2d 760 (C. A. 2), affirmed by equally divided court, 315 U. S. 783.

Thereafter, when the ancillary executor and Silliman as his attorney sought payment of their fees from the Hackfeld estate in the Surrogate's Court in New York, a representative of the United States protested, contend-

ing that, in view of the representations made in 1924, which were ratified by the institution of the Congressional reference ten years later, all of which had been shown in that and the Second Circuit proceeding to have been false and tainted with corruption, no such fees should be paid out of the Hackfeld estate. Indeed, that estate was insufficient to satisfy the judgment obtained in the Second Circuit. But the Surrogate rejected the objection, and, holding that the money judgment obtained by the United States did not impress a trust on Hackfeld's American assets, allowed the fees. *Matter of Hackfeld,* 180 Misc. 406, 40 N. Y. S. 2d 60.

Following that setback, the United States then sought to obtain the deficiency still due it by suing Silliman as a joint tortfeasor with Hackfeld in having wrongfully claimed American citizenship for his client in 1924, a claim pursuant to which large sums were unlawfully obtained from the United States.

A district court judgment in favor of the United States was reversed by the Third Circuit, *United States v. Silliman,* 167 F.2d 607, certiorari denied, 335 U. S. 825, on the ground that the proceedings in the Surrogate's Court were *res judicata,* and that Silliman was thereby absolved from any further liability. Significantly, the opinion was written by Judge Herbert F. Goodrich, who, having been a member of the Advisory Committee for the American Law Institute's *Restatement of the Law of Judgments,* was peculiarly knowledgeable in matters of *res judicata.**

*Any reader of the above whose faith embraces a burning belief in ultimate retribution will be reassured to learn that the originator of Hackfeld's 1924 claim of American citizenship eventually received his come-uppance at the hands of the Commissioner of Internal Revenue. *Reuben D. Silliman,* 11 Tax Ct. Memo. Dec. 921, 12 *id.* 707, affirmed, 220 F.2d 282 (C. A. 2), certiorari denied, 350 U. S. 828.

There is no significant legal difference between the nature of the Government's intervention in the Surrogate's Court proceeding to protest the granting of attorney fees to Silliman, and that of the Government's intervention before the State Engineer of Nevada to protest the granting of well pumping permits to the Cappaerts.

If anything, the present case is a stronger one for a holding of *res judicata,* because there is a closer identity between the issues and contentions presented in the Nevada State Engineer's proceeding and those put forward in the present case, than there was between the New York Surrogate's allowance or disallowance of administrative expenses from the Hackfeld estate and the question of Silliman's liability as a joint tortfeasor with his former client.

What is primarily and principally significant in the Cappaerts' view is that, in both instances, the United States, which was not served and which could not have been made a party against its will, none the less appeared voluntarily and contested a basic issue.

The Cappaerts incline to the view that the issue of the *res judicata* effect of the State Engineer proceeding is "fairly comprised" within the jurisdictional question raised here by Nevada's petition in No. 74-1304 to review the same judgment below of which they complain. See Supreme Court Rules 23(1)(c) and 40(1)(d)(1). But they do not feel it necessary to labor that matter, inasmuch as this Court is of course entirely free to consider the *res judicata* aspect of the present case as an obvious instance of "plain error". Rule 40(1)(d)(2).

CONCLUSION.

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the complaint.

Respectfully submitted.

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AUGUST 1975.

APPENDIX A

STATUTES INVOLVED

[Note: Other pertinent statutes involved that are not set out in full in the foregoing text appear at Pet. App. D1-D8 and at Pet. App. No. 74-1304, xxv-xxvii.]

1. Section 9 of the Act of July 26, 1866, c. 262, 14 Stat. 251, 253, provided as follows:

> "Sec. 9. *And be it further enacted,* That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

2. Section 17 of the Act of July 9, 1870, c. 255, 16 Stat. 217, 218, provided as follows:

> "Sec. 17. *And be it further enacted,* That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or preemption

or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the 'Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada,' approved July twenty-fifth, eighteen hundred and sixty-six."

3. The Desert Land Act of March 3, 1877, c. 107, 19 Stat. 377, provided as follows:

"CHAP. 107—An act to provide for the sale of desert lands in certain States and Territories—

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of twenty five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and

forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided,* that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

"SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated

—

"SECTION 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

4. Section 8(b) of the Taylor Grazing Act of 1934, as amended, now 43 U. S. C. §315g(b), is as follows:

"§ 315g. Acceptance of donations of land; exchange of lands; notice of contemplated exchange; reservation of minerals, easements or rights of use; fee for exchange

* * * * *

"(b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands."

5. Nevada Revised Statutes, Sec. 533.450, is as follows:

533.450 Orders, decisions of state engineer subject to judicial review: Procedure; appeals; appearance of attorney general.

1. Any person feeling himself aggrieved by any order or decision of the state engineer, acting

in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree. Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

2. The proceedings in every case shall be heard and tried by the court, and shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced.

3. No such proceedings shall be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interests, shall have been served upon the state engineer, personally or by registered or certified mail, at his office at the state capital within 30 days following the rendition of the order or decision in question. A similar notice shall also be served personally or by reg-

istered or certified mail upon the person or persons who may have been affected by such order or decision.

4. Where evidence has been filed with, or testimony taken before, the state engineer, a transcribed copy thereof, or of any specific part of the same, duly certified as a true and correct transcript in the manner provided by law, shall be received in evidence with the same effect as if the reporter were present and testified to the facts so certified. A copy of the transcript shall be furnished on demand, at actual cost, to any person affected by such order or decision, and to all other persons on payment of a reasonable amount therefor, to be fixed by the state engineer.

5. No bond shall be required except when a stay is desired, and the proceedings herein provided for shall not be a stay unless, within 5 days following the service of notice thereof, a bond shall be filed in an amount to be fixed by the court, with sureties satisfactory to such court, conditioned to perform the judgment rendered in such proceedings.

6. Costs shall be paid as in civil cases brought in the district court, except by the state engineer or the state.

7. The practice in civil cases shall apply and be consistent with the informal and summary character of such proceedings, as provided in this section.

8. Appeals may be taken to the supreme court from the judgment of the district court in the same manner and with the same effect as in other civil

cases, except that notice of appeal must be served and filed within 60 days from the entry of judgment.

9. The decision of the state engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.

10. Whenever it shall appear to the state engineer that any litigation, whether now pending or hereafter brought, may adversely affect the rights of the public in water, he shall request the attorney general to appear and protect the interests of the state.

6. Nevada Revised Statutes, Sec. 534.030.3, is as follows:

534.030 Supervision of ground water basins by state engineer; petition of well owners; review of orders; extent of supervision; advisory services of governing bodies of water districts, water conservation boards.

* * * * *

3. Such order of the state engineer may be reviewed by the district court of the county pursuant to NRS 533.450.

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